

June 12th, 1758.

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MEMORIAL

FOR

JAMES Earl of MORTON, Defender,

AGAINST

Alexander Earl of Galloway, James Traill younger of Hobister, John Traill of Westness, and others, Proprietors of Lands and Heritages in the Islands of Orkney, Pursuers.

TH E Defender and his Ancestors have, for many Years, been in the Possession, by virtue of Grants from the Crown, of the Crown Rents, Revenues, and Profits of the Earldom of Orkney, which being mostly payable in Bear, Malt, Meal, Oil, and Butter, they have been in use to uplift from the Heritors, Vassals, Tenants, and others, by the particular Weights and Measures used in that Country, for Time immemorial.

About the Year 1733, the late Sir *James Steuart* of *Burray*, a considerable Heritor in *Orkney*, took up a Resentment against the Defender, equally violent as causeless, which shewed itself not only in a most unjustifiable Attack upon the Defender's Person, when in that Country, but in various Attempts to diminish the Defender's Estate, and to withdraw his Rents and Revenues, which had immemorially been in use to be paid by the Proprietors and Inhabitants. Sir *James Steuart*, and a few other Heritors, over whom his Influence reached, refused, without the smallest Pretence of Reason, to pay to the Defender the Feu-duties and Superior-duties, which had been immemorially in use to be paid for their Lands, and carried their Humour so far as to stand an Action, which they obliged the

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Defender

Defender to bring in this Court, for Payment of these Rents and Duties, in which, by the Justice of the Court, he easily prevailed.

Soon after this, Sir *James Steuart* died; but the Earl of *Galloway*, who would appear to be his universal Successor, put himself at the Head of the small discontented Party, which continued to hatch new Schemes of Disturbance. And having easily enlisted in their Service one *James Mackenzie*, a discarded Servant of the Defender's, as their Antiquarian and Pamphlet-writer, they, upon no better Foundation than some Scrapes of his pretended *Gothick* Learning, brought their Action against the Defender to have it declared, that the Superior-duties, which had been immemorially in use to be paid to the Crown of *Scotland* for the Lands in *Orkney*, and were commonly called *Scat-duties*, ought in no Sense to be considered as Feuduties, but as a Land-tax, anciently payable by the Heritors, and which, now that the Land-tax was regularly paid in *Orkney*, as in the other Parts of *Scotland*, ought no longer to be exacted. But, in this Action, the Defender as easily prevailed, as in the former.

There still remains undetermined another Branch of this Opposition, relating to the Weights and Measures of *Orkney*, in which the Pursuers have given the Defender and themselves a great deal of Trouble, and occasioned much Expence. This Cause being now ready for advising, your Lordships are now come to have your Share of the Trouble, by perusing a Volume of the Proceedings and Proofs had, which, in Bulk, exceeds any thing that has appeared in this Court. In order to abridge that Labour, is this Memorial offered, upon the Part of the Defender.

The Pursuers Libel sets furth in Substance, “ That the Islands
“ of *Orkney* and *Zetland*, being Parts and Dependencies of the King-
“ dom of *Norway*, the Weights and Instruments of Weight,
“ yet used in these Islands, are after the Manner of *Norway*.
“ That the Weights are the *Mark*, the *Setteen*, or *Lispund*, the
“ *Meil*, and the *Last*: That the weighing Instruments are the *Byf-*
“ *mar* and *Pundar*; there being two *Pundars*, the *Malt-pundar* and
“ *Bear-pundar*. That the Standard of these Weights was anciently
“ in *Orkney* what it is in *Norway* at this Day, conformable to the
“ following Table:

“ 8 Ounces	-	-	-	} make }	1 Merk.
“ 24 Merks	-	-	-		1 Lispund or Setteen.
“ 6 Lisponds	-	-	-		1 Meil.
“ 24 Meils	-	-	-		1 Last.

“ And,

“ And, it is added, that fifteen of these *Lispunds* make the Standard
 “ of the Barrel for Butter or Oil. That this was the Standard of the
 “ Weights of *Orkney*, by which the Pursuers Predecessors and Authors
 “ did pay their Crown-rents and other Duties. That the original
 “ Standard above-specified of the foresaid Weights have been augment-
 “ ed or increased, from time to time, under the Earls of *Orkney*, and
 “ others, the Farmers and Chamberlains of the said Isles, to the
 “ great Damage of the Pursuers, insomuch that the Weights, ac-
 “ cording to which the Pursuers pay their Crown-rents to the De-
 “ fender, do more than double the true and legal Standard above-
 “ mentioned. That these Weights suffered the first Increase under
 “ *Robert* Earl of *Orkney*, about the Year 1584, being then raised
 “ a complete fourth Part, viz. The *Lispund* increased from 12 *lib.*
 “ to 15 *lib.* and the other Weights in proportion. That, under
 “ *Patrick* Earl of *Orkney*, they suffered a new Increase of one fifth
 “ Part more, viz. The *Lispund* from 15 *lib.* to 18 *lib.* That, from
 “ the Year 1707, under the late Earl of *Morton*, the Weights have
 “ lost their Proportion, and grown out of Shape, to the great Op-
 “ pression of the Pursuers. That the Pursuers had applied to the
 “ Defender to rectify the Weights and weighing Instruments, but
 “ that he had refused so to do. Therefore concluding, that it should
 “ be declared, that the Weights and Instruments of Weight, to be
 “ used in the Islands of *Orkney* and *Zetland* ought and should be fix-
 “ ed and regulated to a fixed and known Standard; so to remain
 “ in all time coming. That the said fixed Standard of the foresaid
 “ Weights should be the Standard-weight, presently fixed and used
 “ in the Kingdom of *Norway*, viz. as in the foregoing Table.
 “ That the *Malt-pundar* Weights are, in Weight and Quantity, one
 “ Third more than the *Bear-pundar* Weights. And it should be
 “ declared, that the Pursuers ought to pay their Crown-rents and
 “ other Duties to the Defender, according to the foresaid Stan-
 “ dard-weight, and no otherways.”

To this extraordinary Action the Defender appeared, and made
 his Defences before the Lord *Elchies* Ordinary; and both Parties
 having, by his Lordship's Order, given in Condescendences, An-
 swers, &c. the Lord Ordinary, “ before Answer, allowed both June 16th,
 “ Parties to prove their several Allegations contained in the Libel, 1753.
 “ Condescendence, Answers, Replies, and Duplies; and also al-
 “ lowed them to prove all other Facts and Circumstances that shall
 “ be thought material for supporting the Pursuers Libel, Conde-
 “ scendence,

“ scendence, and Replies, or for supporting the Defence made for
 “ the Defender in his Answers and Duplies, all *prout de jure*, and
 “ allowed both Parties a conjunct Probation, granted Commission,
 “ &c.” In consequence of which Interlocutor, Proofs have been
 adduced by both Parties, as contained in the State.

The Weights and Weighing Instruments used in these Isles, being so different in their Construction, as well as Names, from these used in *Scotland*, it will be necessary, for the better understanding of this Cause, to give a Description of them.

As to the Weights, both Parties thus far agree, that they consist of the following Denominations, *viz.* a *Mark*, a *Lispund* or *Setteen*, a *Meil*, and a *Last*. It is also agreed that twenty-four *Marks* make a *Lispund*, six *Lispunds* make a *Meil*, and that twenty-four of these *Meils* make a *Last*. But the Defender absolutely denies what is alleged by the Pursuers, that a *Mark* consists of eight Ounces only, and that the Barrel of Butter or Oil contains fifteen *Lispunds*. On the contrary, he will shew, in the Sequel, that a *Mark* consists of about twenty Ounces *Amsterdam* Weight; and that there is no certain Connexion or Correspondence between the *Barrel*, which is Measure, and the *Lispund*, which is Weight.

The Weighing Instruments are two; the *Byfmar* used for small Weights from a *Mark* to a *Lispund*; and the *Pundar* for larger Weights, from three *Setteens* or *Lispunds*, and upwards. A Plan of these Instruments is annexed, for the more easy Explanation of them.

The *Byfmar* is a Beam of Wood about three Foot long, whereof a little more than the Half is a Cylinder, about an Inch Diameter or little more; the rest of the Beam, which makes the But-end, is also cylindrical, but much thicker than the other, being about three Inches Diameter. In the small End is an Iron Staple, on which there is a Hook for hanging on the Goods that are to be weighed. The small End is all along marked with Iron Studs, at unequal Distances; these Studs correspond to, and exhibit the Weight of Commodities weighed, from one *Mark* to twenty-four *Marks*, or a *Lispund*. When the Material to be weighed is hung upon the Hook, the *Byfmar* is horizontally suspended by a Cord going round it. The Weigher shifts the Cord, until the Material weighed equiponderates with the gross End of the *Byfmar*, which serves as a Counterbalance to it. When the Instrument is thus brought to an Equilibrium,

librium, the Cord points out the Studd that is nearest to it, which shews the Weight of the Commodity in Marks.

The *Pundar* is a Beam of about six Feet long, about three Inches Diameter at one End, tapering gradually to the other End; a Hook is fixed at the greater End, for suspending what is to be weighed upon it; about six Inches from that End the Tongue and Shears are fixed by a Staple; at the upper End of the Shears there is a large Iron Ring, through which a cross Beam is put, for suspending the Machine in weighing; and this cross Beam is commonly supported by two Men on their Shoulders. The *Pundar* is marked with Notches at proper Distances, corresponding to and exhibiting the Weights of the Commodities weighed, from three *Setteens* upwards, to ten, eleven, twelve, or more, and the Weight of the Commodity is ascertained by a Stone, of the Weight of a *Setteen*, hung upon the *Pundar* by an Iron-ring, which the Weigher shifts from Notch to Notch, till the Tongue between the Shears discovers the Instrument to be in *aequilibrio*.

These Instruments are extremely rude, and must be very fallacious, not only from the Nature and Construction of them, but from the Opportunity every Weigher has, by shifting his Hand but a little, to make a considerable Odds in the Weight: Nay, it is difficult to avoid this even without Design; for, in making successive Trials of weighing the same Goods upon the same Instrument, it is a great Chance but the Weights come out differently every new Trial. And it is to be remarked, that in the *Byfmar*, when the Fractions of the *Lispund* are weighed upon it, they do not give a Weight proportional to the Integer. For Example, when a Commodity of the Weight of a *Lispund* is delivered upon the *Byfmar* in three separate Weighings of eight Marks each, which ought to come out twenty-four Marks, or a *Lispund*, it nevertheless will fall considerably short of it. The same holds in all the other Fractions of a *Lispund*.

As the Pursuers have confounded, in a strange Manner, their Complaints against the Increase of the Weights, with their Complaint against the Weighing Instruments, it will be necessary attentively to distinguish them. For as to the Instruments they will not surely pretend to say, that the *Byfmar* and *Pundar* were the Invention of the Defender or of his Ancestors. Why then did they make him a Defender in their Complaint against these Instruments, more especially when they knew that he was fully as desirous as they could be to have these Instruments suppressed? He has too much Reason

to believe that these Instruments have been no Friends to his Family; that Slight of Hand, which they are so liable to in weighing, would always be turned against his Factors, who had no personal Interest to be exact, such as the Vassals have. The Defender therefore chearfully gives up these Instruments, and is extremely willing the Law take Place according to the 17th Article of the Union, which is, "That the same Weights and Measures be used throughout the united Kingdom, as are now established in *England*," provided that a just Proportion shall be established between the Weights and Measures immemorially used in *Orkney*, and those in *England*. And the Defender shewed his Concurrence with the Heritors and Inhabitants of *Orkney*, to have these fallacious Weighing Instruments abolished, as far back as the Year 1743, as the Proceedings of that Affair do testify.

The Dispute therefore, between the Parties, turns entirely upon the Weights themselves, and their Contents; which again almost resolves into this Question, What are the Contents of an *Orkney Mark*? this being the lowest Weight known in that Country, of which all the other Weights are Multiples.

The Pursuers, to maintain their Argument of an Increase of Weights, must desert Fact and Reality, and the Weights that now are, and have immemorially been used, and pursue fanciful Conjectures from extraneous Topicks and inconclusive Proofs. They alledge that the *Orkney Mark* ought to consist of eight Ounces *Amsterdam*, and no more, instead of about 20 Ounces; which Diminution they would carry through all the larger Weights. This, besides a Variety of other Arguments, they attempt to prove from the Weights of *Norway*, particularly the *Mark* there; as also from the Weight of a Barrel of Butter, which they say formerly contained 15 *Lispunds*, whereas now it contains only betwixt six and seven, which, they say, is a Proof of the Increase of the *Lispund*.

On the other hand, the Defender, as it cannot be supposed he would give any Countenance to an Increase of the Weights, must be excused to oppose having any Diminution made in them. His Business is, and in which his patrimonial Interest is greatly concerned, to defend the Weights now in constant and uniform Use in that Country, and which the Pursuers and their Predecessors have immemorially observed. Upon this Footing he says, that the *Mark* in *Orkney*, as now used, is the same which has been used in all Times bypast: That there is no Rule or Table in *Orkney*, determining the
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Contents of the *Mark*, in the Ounce of *Amsterdam*, or of any other Country. It is the original and fundamental Weight of that Country; and therefore, it is impossible to say, how many Ounces it ought to contain, though in fact, it does, upon Trial, contain about twenty Ounces *Amsterdam*: That the *Norway* Weights can have no Effect in determining the Weights of *Orkney*; and that no Argument can arise to determine the Weight of a *Lispund*, from the Contents of a Barrel of Oil or Butter; for that the Barrel and *Lispund* have no Relation to, or Connexion with one another, the one being Measure and the other Weight, so that the Relation betwixt them must be merely conjectural.

Before making particular Answers to the Pursuers Arguments and Proofs, the Defender shall make some general Observations, tending strongly to support his Defence.

As it is of the greatest Moment to the Defender, he must take Liberty to observe, in the *first* Place, that the general Scope and Tendency of the Pursuers Action is to deprive him and his Family, at one Blow, of no less than three Fifth Parts of the Estate which he and his Predecessors have, for many Years more than forty, peaceably and uninterruptedly enjoyed in that Country. The Money-rent which he receives does not answer to pay the publick Burdens. Almost the whole of his Rents and Duties are paid in Fungibles, such as Bear, Malt, Meal, Oil and Butter, all which are delivered by the Weights of the Country. If these Weights are to be reduced, in the Proportion from twenty Ounces to eight Ounces in the *Mark*, according to the Pursuers Argument of making the *Mark* consist of eight Ounces in place of twenty, the Consequence is clear and unavoidable, that the yearly Produce of the Defender's Estate must be reduced to two Fifths, or diminished in three Fifths of what it has yielded in all Times bypast. This *damnum* or *incommodum*, may be said to be no conclusive Argument; but it cannot miss to rouse the Attention of every discerning Person, and make him hesitate to strip one of so great a Part of his Property, without the most direct, satisfactory, and cogent Evidence. The free Produce of the Rents and Revenues payable to the Defender from this Estate, extends to about 20,000 *l. per annum*, and has yielded the same Produce immemorially; if the Pursuers should prevail, this Estate must be reduced to 8000 *l. per annum*; a strange and unparalleled Event this must be, when no Part of the Estate or Revenues is evicted, and the Price of all the Commodities not diminished but increased!

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For the better Explanation of what follows, it will be necessary to keep in view the following short History of these Islands of Orkney and Zetland.

Before the Reign of *James III.* of Scotland, these Isles were under the Dominion of the Crown of Norway, when probably the Norwegian Customs prevailed in them.

1468. In 1468, the Sovereignty of these Isles was ceded to *James III.* by his Contract of Marriage with *Margaret* the Daughter of *Christian* King of Norway, and have, since that time, continued under the Dominion of the Kings of Scotland, under the Management of Governors appointed by the Crown.

1592. In the 1592, the Earldom of Orkney and Zetland were dissolved from the Crown, and confirmed to *Robert Stewart*, first Earl of Orkney, and his Son *Patrick*, in terms of a previous Grant made to them anno 1591.

1612. In the 1612, Earl *Patrick* having been attainted and forfeited, these Isles were again annexed to the Crown. And in the 1614, a Contract was executed between the King and the Bishop of Orkney, dividing and ascertaining their respective Shares and Interests in the said Isles.

From this Time, the Revenues and Duties payable to the Crown, were possessed by Donators or Tacksmen under the Crown, till the Year 1643:

1643. When *Charles I.* wadset and disposed these Islands to *William* Earl of Morton, for Security of the Sum of 30,000 *l. Sterling*, in which the King acknowledges himself to be indebted to the said Earl; and the Lands are made redeemable by the King and his Successors, upon Payment of the said Sum. This Contract, and Charter following upon it, were ratified by Parliament in the Year 1646.

1646. In the 1669, this Grant to the Earl of Morton was reduced at the Suit of the Crown, for want of a previous Dissolution in Parliament. The Wadset-lands were resumed, without making any Satisfaction to the Earl of Morton, for the Wadset-sum, or any Part of it.

Feb. 1707. And in this Condition the Family of Morton continued, totally divested of their Possession, notwithstanding repeated Recommendations of Parliament after the Revolution, till February 1707, when these Isles were again dissolved by Parliament, from the Patrimony of the Crown, to the end her Majesty might dispose the same to *James* Earl of Morton, redeemable upon Payment of 30,000 *l. Sterl.* and

and accordingly the same were disposed to him by Charter granted by Queen *Anne* in these Terms, burdened with a Feu-duty to the Crown of 500 *l. Sterl. per annum.*

And in the Year 1742, the Defender obtained an Act of Parlia-
ment, discharging the Reversion that was in the Crown.

1742.

It is a strange and incredible Supposition which the Pursuers make, that the Weights of *Orkney* were increased, first by Earl *Robert*, and next by Earl *Patrick*, in the End of the 16th and Beginning of the 17th Century. The Tenacity of People in retaining their ancient Manners and Customs, and particularly their Weights and Measures, is a Phenomenon remarkable in all the Nations of the World. The strongest Efforts of the most arbitrary Powers have never been able to introduce a Regularity in Weights and Measures, or to withdraw People from their former Usages. This *Lewis XIV.* with all his Plenitude of Power, could not effectuate within his own Kingdom of *France*. How then can it be believed, that any of these Earls of *Orkney* could have been able to bring about such an Increase of the Weights in *Orkney* as is alledged, especially, when no Act or publick Edict is pretended to have been made for that Purpose, nor is there so much as the Tradition of any such Ordinance? The Thing is in itself scarcely possible. Had there been no Weights used in the Country but by the Earls, in receiving their Rents and Duties, a tyrannical Abuse of these Weights might be possible. But as Weights are in constant and daily Usage amongst the People of that Country, in their constant Intercourse with one another, and are imprinted in the Minds and Memory of every Individual from his Infancy, it is impossible that the Imposition or Oppression of an Earl, or his Factors, could have any Effect in making a total Alteration in the Weights, - over a Country.

Again, if it even could be supposed, that Earls *Robert* or *Patrick*, or any of the succeeding Grantees of these Isles, had had the extraordinary Power or Influence to make an Alteration and Increase in the Weights, it still remains incredible that such Imposition and Oppression, which must have been known and felt by every Inhabitant, would not have been loudly complained of upon every Occasion that offered. And yet it is very remarkable, that in all the Remonstrances and Complaints which the Inhabitants of *Orkney* had occasion to make, from time to time, against the Oppressions and Abuses of their Governors, there never occurs the least Mention or Hint of any Attempts having been made towards an Increase of the Weights.

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This, itself, affords the strongest negative Evidence possible against the Pursuers Supposition.

1575. Thus it appears, from the Records of Privy Council, 31st January 1575, referred to by the Pursuers, that the Inhabitants of Orkney and Zetland had complained of various Hardships and Oppressions they suffered under Robert Earl of Orkney, which, say the Pursuers, gave occasion to the sending of Commissioners to enquire into the Acts of Malversation and Enormity that Earl had been accused of; but, amongst the many Instances specified in the Record, there is not the least Insinuation of his having altered or increased the Weights, such a flagrant Act of Oppression, had it had any Foundation, could not have been omitted.

1606. Again, amongst all the Tyrannies and Oppressions which were charged against Earl Patrick, the Son of the said Earl Robert, and for which a Prosecution was commenced against him in Parliament, at the Instance of the King's Advocate, in the Year 1606, and 1615. carried on at different Times till the 1615, there is not the least Notice taken of his having made any Attempts to increase the Weights, which would have been a more strong and relevant Point of Dittay than many of the other Articles he was accused of.

1633. Again, in the Year 1633, the Inhabitants of Orkney preferred their Petition and Address to the Parliament of Scotland, setting forth the various Hardships and Grievances they laboured under. And although the Rectification of any Abuse or Increase of their Weights, had any such been, was of the utmost Consequence to them, and of far greater Moment than any other of the Articles therein mentioned, yet no such Thing was complained of.

1714. And further, in a late Bond of Association in the Year 1714, upon Record in the Books of Adjournal, entered into by several of the principal Heritors of Orkney, whereby they became mutually bound to support and assist each other in defending and maintaining the Privileges of the Country against all Invasions that had been or might be attempted upon their Liberties and Properties, and wherein several particular Grievances are mentioned; yet there is not the least Insinuation of any Ground of Complaint on account of the Weights.

From these Appearances, proved by Record, it seems to be a just and fair Conclusion, that no Increase in the Weights was made by Robert the first Earl of Orkney, nor since his Time. For it is impossible to imagine that the Inhabitants, who took so many Opportunities

injuries of complaining of their Grievances, could have passed over one of the heaviest when they were taking particular Notice of many others of a more trivial Nature. Their Silence in this Regard could not possibly proceed from any other Cause than there being no Foundation for a Complaint of this kind.

Another Argument inconsistent with, and contradictory to the alledged Increase of Weights, arises from a Comparison of the ancient Rentals and Tack-duties paid for the Earldom of Orkney and Zetland, with the Rental as it now stands, and has stood for several Years past. Had the Weights, as the Pursuers pretend, been always increasing from Earl Robert's Time till now, in so much that they are now three Fifths more, or heavier than they were originally, it must have necessarily followed, that the Rental of Orkney, consisting of Bear, Malt, Meal, Oil and Butter, delivered by Weight, must have increased in Proportion with the Weights; whereby, at this Day, the Produce of that Earldom behoved to be three Fifths higher than it was in former Times. But the Fact stands quite otherwise, and, notwithstanding the increased Price of Commodities, the Rental is at this Day not so high as it was at different Periods for a Century and an Half preceeding.

It has been already said, the free Rent of this Earldom, which the Defender receives, after paying the Feu-duty to the Crown, and publick Burdens, is about 20,000 *l. Scots per Annum*. The gross Rent, converting the different Species at the current Prices, is now, and has been for several Years, 30,666 *l. 10s. 1 p.*

There is extant, in the Low Parliament-house, a Rental, intituled, *Rentalis Orcadie pro rege & episcopo*, which, in several Parts thereof, appears to have been drawn out about the Year 1601, and certainly was made before the Year 1612; when, by Act of Parliament, a Commission was appointed for treating of an Exchange of Lands betwixt the King and the Bishop of Orkney; which Treaty took Effect, and, in consequence thereof, in the Year 1614, a Charter was granted from the King to the Bishop of Orkney, and his Successors, of certain Lands of that Country therein mentioned, which are erected into a free Benefice and Bishoprick.

By this Rental 1601, it appears, that the Money-rent of the whole is little more than 200 *l. Scots*, the rest being all payable in kind, in the several Species of Bear, Malt, Meal, Flesh, Oil and Butter; and when the total Quantities of these respective Articles are converted at the present current Prices, the Produce of the whole,

whole, including the Rent of *Zetland*, as it is now lett, will extend to 41,500 *l. Scots*, or thereby, from which being deducted 10,000 Merks, as the Value of the Bishoprick, there remains 31,500 *l. Scots* or thereby, as the gross Rental of the Estate, now belonging to the Defender, which thus appears to have yielded rather more 150 Years ago than it does at this Day.

Again, in the Year 1629, these Isles were lett in Tack by the Crown to *William Dick* Merchant in *Edinburgh*, for the yearly Tack-duty of 35,733 *l. 6 s. 8 d. Scots*, which is considerably higher than the gross Rent the Defender now receives out of them. Such was the Produce of these Isles before the Defender's Ancestor obtained the first Grant of them in the 1643.

After the Defender's Family was divested of their Right in the 1669, these Isles were lett in Tack from the Crown for Tack-duties, higher or lower, as the Tacksman had Interest to make a beneficial Bargain.

1671. In the 1671 they were lett in Tack to *George Scott*, for the Tack-duty of 41,000 Merks.

1693. In the 1693 they were lett to *Alexander Brand* for 25,800 *l.*

1697. In the 1697 they were lett to *Samuel Maclellan* for 21,600 *l.*

The Extent of these Tack-duties is so near to the present gross Rental, that, when to them is added the Expence of managing so large and scattered an Estate, together with the reasonable Profits the Tacksman had just Reason to expect, it must appear, that during all that Time, the gross Produce must have been at least equal to the present gross Rental of 30,000 *l.*

And accordingly, in the 1691, when the Earldom was not in Lease, the Crown's Chamberlain accounted for 27,521 *l. 13 s.* after deducting his necessary Expences.

How is it possible to reconcile these high Rentals and Tack-duties, from the 1601 downwards, with the Pursuers pretended Increase of Weights within that Period, which, if true, must necessarily have had an Influence upon the Rental or Produce of the Earldom?

Another Argument in Support of the Equality of the Weights for 150 Years past, arises from a Comparison of the Prices of the Grain in *Orkney*, at different Periods, and the equal Pace it has kept with the Prices of Grain in the North of *Scotland*.

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By an Exchequer Decree, of this Date, Coist (which consists of two Thirds Malt and one Third Meal) is rated at 64*l.* per Chalder, which is 4*l.* per Meil. 1613.

By another Exchequer Decree, Orkney Bear is valued at 66*l.* 13*s.* 4*d.* per Chalder, a little more than 4*l.* per Meil. 1615.

By Exchequer Record, four *Last* and an Half Coist is estimated to 6 Chalders, 12 Bolls Meal, and valued at 500*l.* Scots, being about 4*l.* 12*s.* 6*d.* per Meil. 1626.

By rescinded Act of Parliament 1649, settling the Prices of Grain over Scotland, in order to the general Valuation, the Prices in Orkney and Caithness are thus fixed, viz. Meal 4*l.* per Boll, Bear 3*l.* 10*s.* per Boll. 1649.

By the Valuation of Orkney, made in pursuance of the foresaid Act, Meal is valued at 4*l.* Scots per Meil, and Malt at 3*l.* 6*s.* 8*d.* per Meil. 1653.

By Decree of Sale of the Estate of *Stenhouse* in Orkney, the common Conversion is, for Meal 5*l.* per Meil, Malt 4*l.* per Meil. 1743.

By Interlocutor in the Sale of *Rapness* in Orkney, the common Conversion is, for Meal 5*l.* per Meil, for Malt 100 Merks per Chalder, which is a little more than 4*l.* per Meil. 1757.

From these Instances it appears, that for 150 Years back, the Meil of Meal in Orkney has sold much at the same Price with the Boll of Meal in the North of Scotland, and that the Advance of the Price of the Meil of Meal in Orkney from 4*l.* which appears to have been the Price of it from the 1613 to the 1653, to 5*l.* which, by the Conversion in Sales, appears to be the Price of it at this Day, is no higher than the Advance of the Price of the Boll of Meal in the Northern Counties, during the same Period. Which Circumstance of the Price of the Orkney Meil, during all this Period, keeping Pace with the Price of the *Linlithgow* Boll, affords almost a Demonstration that the Weights have not been increased in that long Period.

This Observation is confirmed by other Pieces of Evidence, shewing the Prices of the different Species of Commodities for above 100 Years back, which by their Agreement with the present common Conversions of the same Commodities, disproves any Increase of the Weights.

By Charter from the Bishop of Orkney to *William Irvine*, the Barrel of Butter is converted at 40 Merks, which is agreeable to the present Conversion. June 10th, 1615.

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By

By Charter under the Great Seal to *Buchanan of Sound*, confirming three Charters granted by the Bishop in the Years 1619, 1621, and 1627, the *Lispund* of Butter is converted in the *Reddendo* at 2*l.* 8*s.* *Scots*, which is the Conversion at this Time. The *Last* of Malt is converted at 100 Merks, and the *Meil* of Meal at 3*l.* 6*s.* 8*d.*

December 1st, 1624. By Charter from the Bishop of *Orkney* to *Smith of Braco*, the *Lispund* of Butter is converted at 2*l.* 8*s.*

July 29th, 1702. By Decreet of Modification and Locality at the Instance of *Andrew Ker* Minister at *Walls* and *Flotta*, the *Meil* of Malt is converted at 4*l.* nearly the same as at this Day.

Another Method of finding out the Identity of the *Orkney* Weights at different Periods, is by shewing what were the Contents of these Weights, converted into the Measures of other Countries. And this Method likewise confirms the Defender's Argument.

January 30. 1616. Thus, by Decreet obtained, of this Date, at the Instance of *William Carmichael*, Merchant in *Kirkwall*, before the Sheriff of *Orkney*, against *Robert Monteith* of *Eagleshay*, for the Price of a certain Quantity of Malt and Bear, received by the Defender from the Pursuer, in the Year 1592, to have been disposed of for the Pursuer's Behoof, it is libelled and not contradicted by the Defender, altho' he is compearing and objecting to other Articles, that at *Fluckie-fuir* in *Norway*, to which Port the said Victual had been transported, ilk *Chalder* (or *Last*) of Bear would fill and mete out 28 Barrels and half a Barrel Bear.

January 24. 1623. By another Decreet before the Sheriff of *Orkney*, at the Instance of *William Irvine* of *Grind* against *John Cromarty* of *Skae*, &c. for Payment of twenty-eight *Meils*, five *Setteens* Bear, received by the Defenders, to have been sold and accounted for to the Pursuer, it is libelled and not contradicted by the Defenders, personally compearing, that twenty-eight *Meils*, five *Setteens* would measure out twenty-two Bolls Bear in the South, at the Ports of *Montrose* and *Arbroath*, where it was sold. By which Rule, twenty-four *Meils* or a *Last* should yield about nineteen Bolls, *Linlithgow* Measure.

Printed State, p. 191, 192, 196. In conformity with which, we find it proved, by the Oaths of *James Blaw*, *Patrick Traill*, and *Donald Groat*, that a *Last*, *Chalder*, or twenty-four *Meils*, upon the *Malt-pundar*, does, at the present time, yield, from twenty-eight to thirty Barrels in *Norway*; and that the said *Last* or *Chalder* yields from eighteen to twenty Bolls, *Linlithgow* Measure, at *Dunbar*.

When

When we thus find the *Orkney* Weights yielding the same Measure, and no more now than they did in the Years 1616 and 1623, it is impossible to believe there have been any Increase of the Weights in that Period.

Another Circumstance, contradictory of the Increase of the Weights, appears from a Rental of the Bishoprick of *Orkney*, taken in the 1569, with a View to settling the Thirds of Benefices. In that Rental, the particular Quantities, payable in Kind, are enumerated; and when these are stated at the Prices, observed in the Valuation of *Orkney* 1653, the Rental 1569 comes out to be almost exactly the same with the Rental of the Bishoprick, as valued in 1653, and is as follows:

1569.

	Scots.	L.	s.	d.
Money - - - - -		251	2	6
78 Lasts, 21 Meils, Coist, in all 1893 Meils, whereof $\frac{1}{3}$, or 1262 Meils				
Malt at - - - - -	3	6	8	
$\frac{1}{3}$, or 631 Meils Meal, at - - - - -	4	0	0	
13 Last, 14 Meils, 2 Setteens, 19 Marks Flesh at 1 l. per Meil - - - - -		327	3	4
8 Last, 7 Barrels, 6 Lispund Butter, at 20 l. per Barrel - - - - -		2072	0	0
4 Lasts, 1 Barrel Oil, at 16 l. per Barrel, - - - - -		784	0	0
		10,164	19	2
Deduce $\frac{1}{3}$, assigned for Stipends to Ministers - - - - -		3388	6	4
		6776	12	10

Thus it appears, that the Rental of the Bishoprick, according to the Rental 1569, stated at the Prices in the 1653 must have been 6776 l. 12 s. 10 d.

And it appears, by the Valuation of *Orkney* 1653, that the Bishoprick extended to 6796 l. 16 s. 4 d. which is nearly the same, which is a Proof that no Increase had been made in the Weights, from the 1569 to the 1653.

And it is material likewise, in the present Argument, for the Defender to observe, that, from the various Acts of the Heritors and Justices of the Peace in *Orkney*, produced in Process, as far back as the Year 1615, it appears, that the Weights and weighing Instruments have always been the peculiar Object of their Attention, and the

the Subject Matter generally of those Acts ; that they have taken the greatest Care to preserve an Uniformity in the Weights, and, for that Purpose, from time to time, committed the Custody of the Standards to a particular publick Officer, upon Receipt, who had likewise the Charge of making and adjusting the *Bysmars* and *Pundars*, the weighing Instruments, and imposed Penalties upon the Transgressors of their Acts. But there is not the least Insinuation in any of those Acts of the Weights being increased beyond the ordinary Standard. On the contrary, those Guardians of the Police of the Country, by several of those Acts, seem rather to have been jealous of a fraudulent Diminution of the Weights by particular Individuals, to the Prejudice of those they had Dealings with, which was indeed an Abuse more natural to fear, because a great deal more common than that of augmenting the ordinary Weights of any Country.

Another Observation occurs, that, as a *Mark*, of the present Weight, is the least that can be weighed on the *Bysmar*, and three *Setteens*, or half a *Meil*, the least Weight that can be taken upon the *Pundar*, which the Pursuers themselves must admit, it being so clearly instructed by the Proof on both Sides. And it cannot be denied, that there are several of those Instruments, of very ancient Make, still existing, daily used among the Inhabitants, for the Purpose of weighing. Now, if upon none of these Instruments, either old or new, less than a *Mark* of the present Weight can be taken on the *Bysmar*, and less than three *Setteens*, or half a *Meil* upon the *Pundar*, it may be fairly inferred, that the *Mark* never was of the Weight of eight Ounces, and no more ; and the superior Weights in proportion thereto, as is alledged by the Pursuers, because, in that Case, these Instruments must have been altogether unserviceable and useless to the Country, for the very Purpose for which they were designed, as two *Marks*, at that rate, could not be weighed on the *Bysmar*, nor one *Meil* on the *Pundar*. This Observation strikes with the greater Force, that it appears from the Proof, that the old *Bysmars* and *Pundars* in the Country are marked and divided in the indentical same Manner with the new, and are promiscuously used with the new Instruments by all the Inhabitants of the Country, in their Dealings with one another, which shews, that the *Mark*, as it now is, is the same, and no larger than it was when the eldest of these Instruments was made : And there is extant a *Bysmar* made in Earl *Patrick's* Time, of the same Make, and giving the same Weight as these used at present.

Having

Having made these general Observations, which appear sufficient intirely to discredit and overthrow the Pursuers Allegation of an Increase of the Weights, we shall proceed to state some other Facts and Circumstances, appearing from the Proof, tending to support the Sameness or Equality of the Weights, as they have been used in all time by-past, and to confirm the preceeding Observations. These shall be put under several Heads, referring to the Proof in the printed State. And thus it appears,

1mo, *That Pundars and Bysmars are the common Instruments of Weight, used over all the Country of Orkney and Zetland, and are made and adjusted by the Deacon of the Wrights in Kirkwall for the time.*

George Traill of Hobister depones, " That Pundars and Bysmars Printed State, p. 195, l. 10.
 " are the common weighing Instruments betwixt Superior and Vassal,
 " Vassals and Tenants, and Buyers and Sellers, over all the Coun-
 " try, for Bear, Malt, Meal, Loose Butter, and Loose Oil, and
 " made only by the Deacon of the Wrights of Kirkwall, and ad-
 " justed by him."

Donald Groat of Newhall depones the same, as to the common Aged 65. p. 196, l. 28.
 Use of these Instruments, and adds, " That since ever he knew
 " Orkney, which is about forty-eight Years ago, he knows the *Pun-*
 " *dars and Bysmars* to have been made and adjusted by the Deacon
 " of the Wrights in the Town of Kirkwall."

With them concur Thomas Sinclair of Halbreeck, and Thomas Ait- p. 211.
 ken Deacon of the Wrights, and present Custodier of the Weights
 and Instruments, who depones " that he was appointed to his Of-
 " fice by the Magistrates and Dean of Guild of Kirkwall about 18
 " Years since, and that Thomas Foubister was his Predecessor in Of- p. 226.
 " fice."

2do, *That these Instruments are made and adjusted by the same identi-
 cal Standards by which they were made and adjusted in former times.*

The said Thomas Aitken depones " that he was Apprentice five p. 226.
 " Years to the said Thomas Foubister, (his Predecessor in Office) and
 " during the Time of his Apprenticeship, the said Thomas Foubister
 " had in his Custody the very self same Standards, and none else,
 E. " which

Nov. 1753. " which he the Deponent has always made and adjusted *Pundars*
 " and *Bysmars* by, and which he, upon *Saturday* last, the 17th cur-
 " rent, delivered up to the Magistrates of *Kirkwall*: And when-
 " ever his Master *Thomas Foubister* had occasion to make or adjust
 " *Pundars* and *Bysmars*, he saw his Manner of doing it, and that
 " it was by the very same Standards now mentioned. That he
 " knows one *William Tait* a Wright, and also Deacon of the Ham-
 " mermen in *Kirkwall*, to have been the said *Thomas Foubister's* im-
 " mediate Predecessor in his Office of making and adjusting of *Pund-*
 " *ars* and *Bysmars*, and that he, the Deponent, served him a Year, and
 " saw these very Standards above condescended upon, and neither
 " more nor less, with the said *William Tait*; and also saw him make
 " and adjust *Pundars* and *Bysmars* by them. That he has always
 p. 277, l. 33. " made such *Pundars* and *Bysmars*, as he was employed to make for
 " my Lord *Morton's* Doers and Servants, in the same Manner, and
 " by the same Rule and Standards, that he made them for every
 p. 229, l. 14. " Person in the Country, the poorest as well as the richest. That
 " he knows the Size and Shape of every Bone, Rope, Stone, and
 ditto p. l. 34. " Piece of Lead, of which these Standards consist, and that by his
 " Commission he is authorised to make *Pundars* for the whole
 p. 227, l. 37. " Country, with Concurrence of the Steward; and that while
 " the Standards above mentioned were in the Dean of Guild of
 " *Kirkwall's* Custody, in the Year 1743, and afterwards, he did not
 " pretend to make any *Pundars* or *Bysmars*, without those Standards,
 " for that he would have been a great Rogue if he had done so."

3tio. That there is real Evidence, from old *Pundars* and *Bysmars*,
 and Comparison of them, with these lately made, that the *Weights* have
 not been augmented, but continue the same as in former Times.

p. 214, l. 28. *Thomas Johnston* depones, " That there could be no Increase of
 " the Weight of *Pundars* and *Bysmars*, without his knowing or dis-
 " covering it, because he has compared *Pundars* and *Bysmars* lately
 " made, and belonging to himself, and found them agree with an
 " older *Pundar* and *Bysmar*, made in *Oliver Cromwell's* Time, which
 " was again adjusted in King *William* and Queen *Anne's* Reigns:
 " Upon Reflection, the Deponent says, that it was only a *Bysmar* he
 " made the Comparison with, which was adjusted in King *William*
 " and Queen *Mary's* Reign, and also in King *Charles the 1st*'s Reign,
 " which he saw used by his Father, and compared with a new
Bysmar

“ *Bysmar* which his Father had bought, and found them both to
“ agree.”

Nicol Wishart depones, “ That he has a *Bysmar* which is four p. 218, l. 19.
“ times sealed, which *Bysmar* his Grandfather and Father likewise
“ had, and that all his Lifetime, since he began to weigh, he has
“ used that *Bysmar*; that to the best of his Conscience, this *Bysmar*
“ is now neither more or less in its Weight, than when he first be-
“ gan to weigh upon it.”

Andrew Seatter depones, “ That since ever he married, which p. 217, l. 2.
“ was in the Year 1708, when he was thirty-two Years of Age,
“ he always weighed upon his own *Pundar* and *Bysmar* only, which
“ *Bysmar* has five several Seals, viz. one in the Reign of King *Charles*
“ II. one in King *James VII.* one in King *William*, one in Queen
“ *Anne*, and another in King *George I.*’s Reign; and that his *Pun-*
“ *dar* has only one Seal upon it, and that it was made by *George*
“ *Craigie*, the Maker and Adjuster of those Instruments in *Kirkwall*,
“ before the Deponent married, and that it was adjusted by *Thomas*
“ *Aitken*, the present Maker and Adjuster; and that he is tempted
“ by his Neighbours, with weighing their loose Butter upon his
“ *Bysmar*, when they are carrying it to the Store-house at *Kirkwall*,
“ or their Masters there, because his *Bysmar* answers with the *Byf-*
“ *mar* in the Store-house. That the single Seal upon his *Pundar*,
“ was put upon it by *George Craigie*, the Maker, and that when
“ *Thomas Aitken* adjusted the said *Pundar*, he believed he sealed it
“ also, but the Deponent never noticed this; but that *Thomas*
“ *Aitken* told him, that it was larger after Adjustment than before,
“ and that the Deponent was a Loser by it before, but that
“ *Thomas Aitken* told him a Lie, because, that after trying it,
“ when he came home, he found it not to be anyways heavier
“ or lighter than it was before Adjustment. That he knew this
“ by comparing it with another *Pundar*, which he had borrowed
“ when his own was at the Adjustment. That the Makers and
“ Adjusters of the *Pundars* would be content to have all the *Pun-*
“ *dars* of the Country brought in to him to be adjusted, because of
“ the Profit arising to him thereby, and that the Deponent paid
“ fourteen Pence for adjusting his *Pundar*.”

John Flett depones, “ That there was a *Bysmar* of his Great- p. 233, l. 23.
“ grandfather’s, that he saw with his Father, and which had the
“ Seals

“ Seals of King Charles I. King Charles II. and another Seal between
 “ those two, almost wore out, and no other Seal of Adjustment
 “ upon it, and that it had three several Rows of Marks upon it; by
 “ which he means that the Pins were changed three several Times,
 “ and that the Weight upon it was as large as that upon any *Bysmar*
 “ which he has now seen used.”

p. 236, l. 25. *John Gray* depones, “ That his Father died in the Year 1724;
 l. 35. “ that soon after his Father’s Death he bought a new *Pundar* out of
 “ the Town of *Kirkwall*, which he has used ever since, and that he
 l. 39. “ knows this *Pundar* to be the same in its Weight now as when he
 “ first bought it; and that this *Pundar* was never adjusted.”

p. 239, l. 8. *James Sutherland* depones, “ That he has always used a *Malt-*
 “ *pundar* which belonged to his Father, and which he saw with
 “ him in his Lifetime, and found in the House at his Decease; and
 “ that this *Pundar* has been adjusted, but never since he remembers.
 “ That there are new *Pundars* in the Island (*South Ronaldsay*) parti-
 “ cularly one belonging to *James Thomson*, made about three Years
 “ ago, and another belonging to *John Gray* of *Roberrie*, made some
 “ Years before, but how long he does not now remember; and
 “ that having bought Victual from these two Persons, which was
 “ weighed upon their own *Pundars*, he weighed it over again upon
 “ his own *Pundar*, and found the Weight upon the foresaid three
 “ *Pundars* to agree.”

p. 244, l. 7. *Peter Laughton* depones, “ That he found a *Pundar* in the Mill of
 “ *Elwick*, of which he has been Tacksman these thirty-seven Years
 “ past, and which *Pundar* belonged to Mr. *Henry Smith*, Minister of
 “ *Shapinsay*; and that he, the Deponent, never saw any *Pundar*
 “ like this, it being capable of weighing sixteen *Setteens*, and that
 “ it is a *Malt-pundar*. That this *Pundar* was the exactest *Pundar* he
 “ ever saw, and was three times adjusted. That having once
 “ weighed two *Meils* upon it, and at the same time weighed this
 “ Weight in two equal Halves, they agreed exactly together; that,
 “ conform to the Measures they used always in the Island of *Sha-*
 “ *pinsay*, the Weight upon this old *Pundar* was the same with the
 l. 32. “ Weight upon the *Pundars* now used. That Barrels is the Mea-
 “ sure used in *Shapinsay*, and the Measure he has always used was
 “ one

"one and the same Barrel, till within these three Years, that he had no occasion for measuring any Corn."

N. B. It appears that Mr. Henry Smith, mentioned by this Witness, was Minister of Shapinshay before the Year 1656, from a Decree of Adjudication at his Instance against Hendrison of Holland, wherein he is designed late Minister of Shapinshay, in the Hands of John Traill of Westness, one of the Pursuers.

William Traill depones, "That he has a Pundar of his own, p. 249, l. 9. which was never adjusted since the Year 1725, when he bought it from the Relict of Robert Douglas, who had been Tenant in Wirk immediately before him; which he still uses to this Day." l. 29.

4to, That old and new Pundars are used promiscuously.

William Traill depones, "That some Pundars may differ six p. 248, l. 39. Marks from others; but that old Pundars and new are used promiscuously, as they are first at hand, and, for what he knows, has been so all his Lifetime."

William Traill of Frottot depones, "That the old and new Pundars are reckoned to be the same in their Weight, and promiscuously used as People are possessed of old or new Pundars." p. 250, l. 30.

5to, That the Manner of weighing upon Pundars and Byfinars, is the same now that it was in former Times.

Patrick Traill, late Baillie of Kirkwall, depones, "That it is Aged 73. p. 209, l. 17. fifty Years since he first began to weigh upon the Malt-pundar and Byfmar, and that he has continued yearly since, to weigh more or less on these Instruments: That from the first Time he began to weigh, till now, he knows of no Alteration in the Method of weighing upon Pundars and Byfmars."

To the same Purpose Donald Groat depones, as also Thomas Johnston. p. 197, l. 22. p. 213, l. 40.

William Traill depones, "He is sure he has been fifty-five Years p. 199, l. 19. in the Practice of weighing upon Pundars and Byfmars; and that, l. 30. since ever he first began to weigh upon Pundars and Byfmars, he himself never knew any Alteration on them, nor that they were

“ anyways increased ; only he has known some *Pundars* weigh more
 “ or less than other *Pundars*.”

p. 201, l. 34. *Andrew Young* depones, “ That since the Year 1725, he has been
 “ Surveyor of the Customs in *Orkney*, and continues still in that
 “ Office: That, in all that Time, he neither believes, nor suspects
 “ any general Increase upon the Weights of the Country ; and from
 p. 202, l. 8. “ all the Trials the Deponent has made of *Pundars* since he first be-
 “ gan to weigh, he believes them to be the same as at first ; but
 “ has heard in the North Isles, particularly in *Westray*, Complaints
 “ that *Pundars* were sometimes six Marks heavier, sometimes six
 “ Marks lighter than others.”

p. 209, l. 14. *Patrick Traill* depones, “ That it is about fifty Years since he
 “ first began to weigh upon the *Malt-pundar* and *Bysmar*, and has
 “ continued yearly since, to weigh more or less upon these Instru-
 “ ments: That he does not know, and never found any Differences
 “ in the Weight, in all that Time ; nor does he know, or ever
 “ saw any Order or Warrant for altering the Weights in all that
 “ Time.”

Aged 77.
 p. 210, l. 17. *John Fotheringham* depones, “ That it is now about fifty Years
 “ since he first began to weigh upon the *Pundars* and *Bysmars*, and
 “ continued ever since to be weighing some, more or less, as occa-
 “ sion offers. Depones, That first when he began to weigh, he
 “ heard no Complaint against the Increase of *Pundars* and *Bysmars*.”

Aged 71.
 p. 212, l. 37. *Edward Spence*, Tenant in *Westburgh* in *Sandy*, depones, “ He
 “ never heard any body say, that the *Pundars* and *Bysmars* over the
 “ Country were increased in their Weight ; and that he never knew
 “ them to be otherwise than they are at present, though they may
 “ alter by the Hand of the Weigher.”

p. 213, l. 40. *Thomas Johnston* depones, “ That it is forty Years ago, and above,
 “ since he began to weigh upon the *Pundars* and *Bysmars*, and that
 “ the Weight of the Mark, *Setteen* or *Lispund*, and *Meil*, are the
 “ same now, and no greater than when he first began to weigh.”

Aged 76.
 p. 216, l. 5. *Andrew Scatter* of *Cottasearth*, depones, “ That in all his Time,
 “ he never heard any Complaint of the Increase of the Weights
 “ upon *Pundars* and *Bysmars*, and believes them to be the same now
 “ that

“ that ever he remembers them to have been : That when he was
 “ twenty-four Years of Age, and then a Servant to *Eaglethay*, he
 “ understood to weigh upon *Pundars* and *Bysmars*, and did then
 “ weigh upon them ; and what he means by understanding *Pundars*
 “ and *Bysmars*, is, that he knew how to weigh upon them from the
 “ lowest to the highest Weight ; and that he has and still conti-
 “ nues yearly to weigh upon these Instruments.”

Nicol Wisbart of *Westquoy* depones, “ That, in his younger Days Aged 92.
 “ he did not hear that the Weights of this Country upon *Pundars* P. 218, l. 13.
 “ and *Bysmars* were increased, nor does he know any thing about it :
 “ That he never heard his Grandfather, or his Father, complain, l. 24.
 “ that the Weights of this Country were increased : That his Grand-
 “ father was a very old Man when he remembered him.”

William Honeyman of *Græmsay*, depones, “ That he never heard Aged 50.
 “ his Father say, that the Weights of *Orkney* were increased in his P. 218, l. 31.
 “ Time ; and that his Father died in the Year 1737, as he thinks ;
 “ and that he was then going in the sixty-first Year of his Age :
 “ That from his own proper Knowledge he does not know of any
 “ Increase of the Weights in all his Time ; and since the Year 1725,
 “ he has been in use of receiving and delivering his own Farms upon
 “ *Pundars* and *Bysmars*.”

Thomas Aitken depones, “ That in all the Time he served *William* P. 228, l. 201
 “ *Tait* and *Thomas Foubister*, and ever since, till the Year 1743, he
 “ never heard any such Thing as an Outcry against the Increase of
 “ the Weights ; but that since that Period he has heard such an
 “ Outcry, and they can never be satisfied.”

Edward Clouston, Shipmaster in *Stromness*, depones, “ That his Aged 49.
 “ Father was, in May 1753, when he died, eighty-two Years of P. 231, l. 27.
 “ Age, and that he never heard his Father say or complain that
 “ the *Pundars* and *Bysmars* were increased in their Weight over the
 “ Country.”

John Flett of *Bea*, in the Parish of *Harray*, depones, “ That, Aged 44.
 “ when his Father died in April 1752, he was then seventy-six P. 232, l. 23.
 “ Years of Age : That he never heard his Father, nor any of the
 “ old or young People of the Parish of *Harray*, where his Father
 “ lived,

lived, and he now lives, say or complain, that the Weights on
 p. 233, l. 21. *Pundars* or *Bysmars* were ever increased in their Time: That
 “ there is a Possibility that the Weights might have been increased
 “ insensibly in his own Time, but that he never knew any thing
 “ about it.”

Aged 46.
 p. 234, l. 17. Mr. *John Ballandine*, Minister of the Gospel at *South Ronaldsay*
 and *Burray*, depones, “ That, in all his Time, he never heard any
 “ Person in the Island of *South Ronaldsay*, where he had most Ac-
 “ cess to converse on that Subject, say, that the *Pundars* and *Byf-*
 “ *mars* were increased in their Weight in their Time; he has par-
 “ ticularly heard *John Flett* of *Gruthie*, who died since the Year
 “ 1746, and who reckoned himself above seventy, say, that he
 “ knew of no Increase of these Weights in his Time. The Depo-
 “ nent has heard *Sir James Steuart* of *Burray*, a Year, or two, or
 “ three, after the Deponent came to the Country, say, that these
 “ Weights were increased, but whether in his Time, or not, the
 l. 39. “ Deponent does not remember: That from what old Papers he
 “ has seen, or from what Conversation he has had on that Subject,
 “ he has no Reason to believe that there is any Increase. And he
 “ owns, after Examination of the Papers he has seen, and after
 “ hearing the Reasonings on both Sides of the Question, he be-
 “ lieves there is no Increase: And depones, that he was settled
 “ Minister of *South Ronaldsay* in the Year 1735, and that he came
 “ first to the Country in the Year 1734.”

Aged 56.
 p. 236, l. 22. *John Gray* of *Roebury*, in the Island of *South Ronaldsay*, depones,
 “ That he has lived in the Island of *South Ronaldsay* all his Time
 “ hitherto: That his Father and Grandfather likewise lived there
 “ all their Times: That his Father, who died in the Year 1724,
 “ was then, as he thinks, about sixty-three Years of Age: That
 “ he never heard his Father, or any of the People, young or old,
 “ of that Island, say, that the Weights, upon the *Pundars* and *Byf-*
 l. 30. “ *mars*, were increased, or grown greater in their Times: That it
 “ is near about thirty Years since he began first to weigh upon *Pun-*
 “ *dars*, and about forty since he first began to weigh upon *Bysmars*,
 “ and does not think that the Weights upon *Pundars* and *Bysmars*
 “ has been increased in all his Time, and that he knows nothing
 p. 237, l. 7. “ about it: That soon after his Father's Death, he began to pay
 “ Superior-

“ Superior-duties for his own Lands to the Earl of *Morton*, and con-
 “ tinues so to do ever since, and that he has no Reason to think or
 “ believe, that there is greater Weight taken from him now, by
 “ the Earl of *Morton*’s Doers, than when he first began to deliver
 “ his Superior-duties; and depones, he thinks he would have dis- p. 237, l. 20.
 “ covered if there had been any Increase of Weight by the *Pundar*
 “ and *Bysmar*.”

James Sutherland of *Winbreck*, depones, “ That he has all his Aged 56.
 “ Time resided in the Island of *South Ronaldsay*, that his Father, p. 238, l. 23.
 “ Grandfather, and Great-grandfather, always had Lands and He-
 “ ritages in that Island. That his Father died in the Year 1716,
 “ and was then fifty-five Years of Age; that he never heard his Fa-
 “ ther, or any of the People of *South Ronaldsay* say, or complain,
 “ that the Weights upon the *Pundars* and *Bysmars* were increased.
 “ in their Time, until the Difference happened between Sir *James*
 “ *Steuart* of *Burray*, and the late Mr. *Hay* of *Balbithan*, then Cham-
 “ berlain of the Earldom, and that he thinks that Difference hap-
 “ pened in the Year 1735 or 1736. That after this Difference
 “ happened, he has heard *John Flett* of *Gruthay*, an old Man in
 “ in that Island, *John Cromarty* in *Wydwall*, another very old Man
 “ in that Island, and *William Swanson*, an old Man also in that
 “ Island, and several others whom he does not now remember, say,
 “ that the Weight upon *Pundars* and *Bysmars* was not increased in
 “ their Times.—And depones, That he has no Reason to think, p. 239, l. 5.
 “ nor does he believe, that the Weights taken by the Earl of *Mor-*
 “ *ton*’s Chamberlain or Doers, is any higher now, than he ever re-
 “ members it to have been.”

David Allan in *South Seatter*, in the Parish of *Sandwich*, de- Aged 73.
 pones, “ That he, and his Father also, to the best of his Know- p. 242, l. 38.
 “ ledge, lived all their Times in the Parish of *Sandwich*; that his
 “ Father died about thirty-six Years ago, and was then about
 “ eighty Years of Age, and that the Deponent was a married
 “ Man about forty-one Years, and is now a Widower three Years.
 “ That some few Years before he was married, he began to weigh
 “ upon *Pundars* and *Bysmars*, and has yearly since that time been
 “ in use of weighing upon those Instruments. That till now he
 “ never heard of any Increase or Decrease in the Weight upon *Pun-*
 “ *dars* and *Bysmars*, and that he has always paid his Debt to his
 G “ Masters,

Masters, and particularly to Baillie Donald Great, Tacksman of the Bishoprick, at Stromness, and to the Bishop's Store-house at Kirkwall, and never found any Difference in the Weights; and that he, the Deponent, was always satisfied with the Weight he delivered, as the Receivers were with the Weight they received."

Aged 62.
p. 243, l. 40. Peter Laughton, late Tenant in Elwick, in the Island of Shapinshay, now Residenter there, depones, " That he has lived all his Time in the Island of Shapinshay, and that his Father, who died about ten, or rather fourteen Years ago, was then seventy-three Years of Age, and that he never heard his Father, nor any Person else in the Island of Shapinshay, or any where else, say or complain, that the Weights upon Pundars and Byfmars, were increased in their Time."

Aged 63.
p. 245, l. 25. Robert Sclater in Nisbhouse, in the Parish of Birsay, depones, " That all his Life-long he has lived in the Parish of Birsay, and his Father lived there before his Day. That his Father, who is dead about eighteen Years ago, was about seventy Years of Age. That he never heard his Father, or any Person whatsoever, in the Parish of Birsay, say, or complain, that the Weights upon Pundars and Byfmars were increased in their Time, and that he thinks he has weighed upon those Instruments since ever he was a Land-labourer, which is about thirty Years ago."

p. 248, l. 10. William Traill depones, " That he was born in the Island of Westray, and left that Island in the Year 1725, and ever since that Time he has resided in the Parish of St. Olla. That he heard nothing of a general Complaint of the Increase of Weights upon Pundars and Byfmars, while he resided in Westray.— And ditto p. l. 22. " when first he came to the Parish of St. Olla, and for several Years after he heard no Complaints against the Increase of the Weights upon Pundars and Byfmars. That the Weights upon those Instruments, are the same now, as first he knew them; and he thinks, to the best of his Knowledge, it is now about forty-four Years since he began to receive and deliver on Pundars and Byfmars.— That if any considerable Increase had been of the p. 249, l. 17. " Weight, he thinks he would have discovered it, as he had so much Interest in the Affair."

John Houston depones, "That, according to his Opinion, there p. 255, l. 15.
 "has been no Alteration of the Weights of *Orkney* these thirty
 "Years, since he began to know them, and that he has heard from
 "old People, that they were always such as they are at present,
 "that is, no larger nor less."

Donald Groat depones, "That about twenty Years ago and a- p. 197, l. 29.
 "bove, as he thinks, and at several Times since that Period, he
 "has heard Complaints made of an Increase of the Weight upon
 "*Pundars* and *Bysmars*, but knows nothing of such Increase him-
 "self."

The following short Remarks seem naturally to result from the Premises.

That it must appear a very extraordinary Attempt in the Pursuers, to alter and overturn the whole Weights of a Country, which have for Time within Memory, been the universal and uniform Measure of their Transactions with one another, and that without pretending to shew any Law, Statute, or legal Standard, whereby they could fix and ascertain, what they groundlessly assert to have been the original Weights. It has not been in the Power of the most absolute Monarchs, to make their People desert their ancient and accustomed Weights and Measures. It would be strange, if such an extraordinary Revolution had been brought about in *Orkney*, without any Act of Power or Authority: And it would be still more astonishing, that the whole Inhabitants should have combined to increase the Weights to their own Prejudice, and in favour only to the Superior.

That the Identity or Equality of the Weights, appear to have continued, not only during the Memory of the oldest Witnesses, of all Degrees in these Isles, but must be presumed to have been the same, as far back as written Evidence goes. Every Innovation in this respect, must have been perceptible to all the Inhabitants, even the lowest. Complaints must have been shewed; and yet, notwithstanding the frequent Occasions that were given and embraced by these People, of complaining of Grievances and Abuses, even the most trivial, there is not so much as an Insinuation made from the Beginning of *Earl Robert's* Government, till the present Time, of an Increase in the Weights, except what these Pursuers and their Party,

Party, thought proper, for their own Purposes, to stir up since the Year 1743.

That the Increase of the Weights, in the Proportion of two to five, as the Pursuers alledge, is incredible and absurd: For that the necessary Consequence must have been, that the Rents and Revenues, formerly payable to the Crown, and of late to the Defender, and delivered by Weight, must have increased in Proportion: Whereas, on the contrary, it is proved, that these Rents do not extend to a higher Value than they yielded 150 Years ago. It cannot be said, there has been any Decrease in the Price of Commodities, within that Period.

That the Price, or Value of Commodities, of the Weight of *Orkney*, having within that long Period, kept equal and proportional Pace, with the like Commodities of the Weights and Measures of *Scotland*, is a Proof there has been no Alteration in the Weight. Thus the *Meil* of Grain in *Orkney*, has, for these 150 Years past, kept an equal Pace in its Price, with a Boll of Grain in the North of *Scotland*.

That a *Meil* of Bear in *Orkney* having, in the Year 1592, yielded the same Number of Barrels in *Norway*, which a *Meil* of Bear yields at this Day, affords a Demonstration of the Identity of the Weights.

And when to these it is added, that the Standard Instruments and Weights have always been kept by a publick Officer, according to which the new ones were made and adjusted.—That the new Instruments are constructed in the same Form, and yield the same Weight as all the oldest Instruments in the Country do.—That the *Mark* Weight of the present Time is the smallest Weight that can be weighed upon any *Bysmar* in the Country, and three of the present *Setteens* the smallest Weight that can be weighed upon any *Pundar*.—That the old and new Instruments are used promiscuously.—And that it is proved, that there has been no Increase of the Weights, within the Memory of the oldest Witnesses. These Facts and Circumstances conjoined must give the strongest moral Evidence that there has been no Increase of the Weights. It is absolutely impossible they could have increased from two to five.

That the only proper Methods for ascertaining the Weights and Measures of a Country for the Regulation of all Transactions and Payments, must be the universal Usage and Custom of the Country for

for the Years of Prescription, or for Time within Memory. Such immemorial Usage would have the Force even to abrogate a Statute or Edict, fixing the Standards of the Weights and Measures. Much more must it have that Effect, where no legal Standard can be produced.

That though the Defender has had the good Fortune to bring Evidence of the Identity of the Weights for near 200 Years back, he conceives that, in order to defend his Interest in this Action, he was under no Necessity for going further back than for the Space of forty Years. It is impossible to doubt that the Weights are now the very same, as they were when this Family obtained the Grant from the Crown in the 1707. By these Weights he has been in the constant and uninterrupted Possession of receiving the Duties and Casualties of Superiority. His Title therefore to continue in that Possession, is established by the positive Prescription, the great Security of the Property of the Subject.

We shall now proceed to take a View of the Topicks and Arguments, which have been urged by the Pursuers, in Support of their Action. One would naturally ask, what Arguments can be brought to destroy, or even weaken the Force of that strong, connected, circumstantiated Evidence, produced by the Defender. The Answer will soon appear to be, that they have brought no direct or positive Evidence at all; but that, having once boldly asserted, and set their Hearts upon proving their Assertion, they have, for want of better Materials, been obliged to amuse themselves with remote and inconclusive Arguments, whimsical Calculations and Conjectures, and vague and uncertain Reports and Circumstances.

Nothing can be more remote and inconclusive than the Argument, with which the Pursuers set out, and which they make the Basis of their whole Hypothesis. They say, that Orkney, about 300 Years ago, belonged to the Crown of Denmark. That, as the Norwegian Customs then prevailed in Orkney, so did their Weights and weighing Instruments, which still retain the Norwegian Names and Denominations: Whence they infer, that the ancient Weight in Orkney has been the same with the ancient Weight of Norway. And lastly, to conclude the Sorites, they attempt to bring a Proof of the present Weights of Norway, which they would substitute in place of the Weights used there above 300 Years ago. The Conclusion of the whole is, that, as the Mark of Norway contains, at present,

present, eight Ounces only, the *Mark* of *Orkney* ought to be reduced to that Standard, that is, from twenty Ounces to eight Ounces.

This Argument is manifestly as absurd upon the whole, as it is lame and defective in every Part. For that *imo*, Supposing the Names of the Weights and weighing Instruments to be *Norwegian*, and to have been derived from *Norway*, it will by no means follow, that the Weights in *Orkney* were the same with the Weights of *Norway*. The History and State of the Weights and Measures, over all the Nations of *Europe*, as given by all the Authors upon that Subject, shew the great Diversity, in that respect, which prevails not only among different Nations, but among the different Provinces of the same Nation. In *France*, notwithstanding repeated Edicts of the absolute Monarchs, the Weights and Measures, though going under the same Denomination, are greatly different in the several Provinces. In *England*, the Statute Weights and Measures are far from being universally observed: On the contrary, each Corner of the Country has its peculiar Method of Computation. In *Scotland*, the *Linlithgow* Boll is far from being universally observed; they vary from it almost in every County, some of them using a Boll containing equal to two *Linlithgow* Bolls. Even in the Kingdom of *Denmark*, of which *Orkney* is said to have been a Part, we find, by a Table in *Chamber's* Dictionary, that the Weights of *Bergen* in *Norway* differ from the Weights of *Copenhagen* in *Denmark*, in no less Proportion than as 95 to 107. When there is such an universal Variation and Difference in Weights and Measures, it is surely impossible to say, with any Certainty, that the *Mark*, *Lispund*, &c. in *Orkney*, was anciently the same with the like Denominations of Weight in *Norway*, even supposing we had a Proof what the ancient Weights of *Norway* were. The Diversity which prevails in adjoining Provinces, might have much more taken place in *Orkney*, which is totally disjoined and unconnected with *Norway*.

In the next place, it would have been expected, that, to give their Argument even a specious Appearance, the Pursuers would have brought some authentick Evidence of the Standard-weights of *Norway*, at or before the Time of *Christian I.* about 300 Years ago, and before *Orkney* was ceded to the Crown of *Scotland*. It is believed, that, in the Space of 300 Years, great Changes have happened in the Weights and Measures of every Kingdom in *Europe*. *Denmark* cannot be supposed to have been free from the Alterations natural in the Course of Things. The Pursuers, however, have
not

not even attempted to bring a Proof of the ancient Weights of Norway, which is a Circumstance so essential in the Chain of the Argument, that the Want of it must at once overthrow the whole.

They have, indeed, endeavoured to supply that palpable Defect by a Proof of the Weights presently used in Norway. But if their Proof, in this respect, was unexceptionable, it still could not give Satisfaction as to what their Weights might have been 300 Years ago. At the same time, this Proof is liable to many Objections and Suspicions. It consists, *first*, of a Declaration emendicated, *ex parte*, from a Burgo-master of Bergen, long before a Proof in this Cause was allowed by the Ordinary; in support of which they afterwards produced three or four Skippers of Norway Vessels. The Sum of their Evidence is, That the Norway Mark consists of eight Norway Ounces, and that the Norway Ounce is much the same with the Amsterdam Ounce; and the Burgo-master has taken upon him to say, that such has been the Weight of the Mark, *a longissimis retro temporibus*.

We cannot admit this Evidence to be sufficient, *first*, Because it is not the best Evidence that might have been had. An authentick Extract of the Laws or Edicts, appointing the Standard of Weights and Measures, ought to have been produced. If there are no such Edicts, the Weights and Measures must, in the Nature of Things, be various and different in different Parts of Denmark, so that the usual Weights in one Place, cannot determine those of another Place in the same Kingdom. *2do*, None of these Witnesses can be supposed to have Knowledge enough to be able to determine with Precision in so intricate a Matter, as the Weights and Measures in every Country are, which must appear from their making one Standard take place all over Norway, which is incredible. We cannot suppose these Norway Witnesses to be wiser than People of the same Rank in Scotland; and yet, it is believed, no Man would expect to get an exact Account of the Nature of the Weights of Scotland from the common Shipmasters or Baillies of Burghs. They could tell what fell under their daily Observation, but could not enter into such a minute Detail as is necessary in a Question of this Kind. *3tio*, Their Irregularity or Inaccuracy appears glaring in one Instance, where they make the Norway Ounce equal to the Amsterdam Ounce; the contrary of which is proved from an accurate Table in Chambers's Dictionary, where the Difference between the Weight of Bergen and the Weight of Amsterdam, is stated as 95 to 100.

But

But too much Notice has been taken of an Argument which displays, in every Article, its own Insufficiency.

The Pursuers having assumed, from their *Norway* Proofs, that the *Orkney Mark*, like their *Norway Mark*, consisted of eight Ounces only, proceed to diminish all the other Weights in the same Proportion. They say, that as 24 *Marks* make a *Lispund*, this *Lispund* consisted originally but of 12 *lib.* Weight; and in order to prove this to have been really the Weight of the *Lispund*, they resort to the Barrel whereby Butter and Oil is delivered, which Barrel, they affirm, has been constantly and unvariably the same in all Times bypast, containing 180 *lib.* Weight: And having thus fixed the Barrel immutably at 180 *lib.* Weight, they alledge, that in the Years 1562, 1568, 1569, this Barrel contained 15 *Lispunds* of Butter, which answers exactly to 12 *lib.* to the *Lispund*. For Proof of this they refer to Excerpts taken from some old Accounts lying in the Laigh Parliament-house, relating to the Thirds of Benefices in the Years 1562, 1568, and 1569, where the Barrel is computed to contain 15 *Lispunds*.

They next alledge, that this original Weight of the *Lispund* was first increased by Earl *Robert*, who raised the *Lispund* from 12 to 15 *lib.* Weight, which they attempt to prove by the Barrel's containing only 12 *Lispunds* in his Time: That afterwards Earl *Patrick* increased the *Lispund* from 15 to 18 *lib.* Weight, the Barrel, in his Time, containing 10 *Lispunds*: That from that Period the *Lispund* has been still increasing, till now it is brought to the enormous Weight of 28 *lib.* Weight, the Barrel containing, at present, only between 6 and 7 *Lispunds*.

But the Defender hopes that this Argument, though it has the Appearance of Ingenuity, will, upon Examination, be found to have little Solidity. The whole of it proceeds upon this Hypothesis, that the Barrel has continued unvariable, containing always 180 *lib.* Weight; which Barrel is erected as a Standard by which the original Standard of the Weights is to be fixed, and their alledged Increase tried.

The first and general Answer to this is, that there is no natural Relation or Connexion betwixt a *Barrel* and a *Lispund*, the Barrel is a Measure of Capacity, and the *Lispund* is Weight, having no more Relation the one to the other than a Barrel of Ale has to the Pound or Stone Weight. It may be possible, by Experiments, to find out how many Pound Weight a Barrel of Ale may weigh.

But

But still Pounds are not in Computation held to be component Parts of a Barrel. In the same Manner, the *Lispund*, which is Weight, has in *Orkney* no Relation to the Barrel. The Manner of paying Butter and Oil in *Orkney* is by Barrels and Half-barrels, and by *Lispunds*. But these *Lispunds* of Butter have no fixed or regular Connexion with Barrels or Half-barrels, which is clear by the Tenor of the Charters, and Method of paying, over the whole Country. Thus, for Instance, a particular Vassal or Heritor is obliged to pay one or more Barrels, or Half-barrels of Butter, and twenty or thirty *Lispunds* over and above, if these *Lispunds* had any fixed Connexion with, or Relation to Barrels, these thirty odd *Lispunds* would undoubtedly have been converted into Barrels, and not have stood upon the Foot of *Lispunds*, seeing there were more *Lispunds* paid singly, than ever was computed to a Barrel. The continuing the Payment of such a Number of *Lispunds*, could proceed from nothing but the Disconnexion that there is naturally between a *Lispund* and a Barrel, or Half-barrel. Neither the Superior, nor the Vassal, knew the exact Proportion between a Barrel and a *Lispund*, though they knew each of them separately; and therefore, Barrels and *Lispunds* have always continued to be paid by separate Computations. This may be illustrated by a familiar Example: A Vassal or Tenant may be bound to pay two Chalders, four Bolls of Barley, but it never occurred, that any one was taken bound to pay one Chalder, and twenty Bolls; because, by the fixed Relation between the Boll and the Chalder, the twenty Bolls would have been naturally converted into one Chalder, four Bolls. In like Manner, had there been in *Orkney*, any fixed Relation between the Barrel and the *Lispund*, no Man would have been taken bound to pay a Number of Barrels, and twenty or thirty *Lispunds* over and above, for these odd *Lispunds*, would have been converted into Barrels.

The Reason why, in the Accounts of the Factors or Chamberlains of *Orkney*, with their Constituents, there frequently appears a Conversion of a certain Number of *Lispunds* of Butter into Barrels, which Conversion was ambulatory and various, arose from this. That over *Orkney* there is, besides the Butter payable in Barrels and Half-barrels, a great Quantity of Butter paid in *Lispunds*, to the Extent of no less than 532 *Lispunds*. This Butter paid in *Lispunds*, is commonly called *Loose Butter*, and must be collected by the Chamberlain or Factor, through all the different Isles of *Orkney*, at a great Expence. After the loose Butter was so collected, it behoved to be

packed into Barrels, and made fit for the Market, by the Factors. This necessarily produced betwixt the Factor and his Constituent a Kind of Conversion of *Lispunds* into Barrels; that is, the Constituent was to demand so many Barrels from the Factor, for so many *Lispunds* of loose Butter uplifted by him. But this Conversion, which was regulated by no fixed Standard between the Barrel and the *Lispund*, behoved to be arbitrary and changeable, according to the different Agreements between the Constituents and their Factors. The less Acquaintance the Proprietor or Constituent had of these remote Countries, the better Bargain would his Factor get of him. And, on the other hand, the better the Affairs of that Country came to be understood by the Proprietor, the Factors would get a smaller Allowance. This Circumstance, when duly attended to, will plainly account for the different Conversions we see of *Lispunds* into Barrels at different times; and why sometimes 15, sometimes 12, sometimes 10, and sometimes 8 *Lispunds* are computed in a Barrel. Not that there was at any Time a determined Relation between the *Lispund* and Barrel, but because such were the Agreements between the Constituents and their Factors. And all of these Conversions would naturally exceed the true Proportion between the Barrel and the *Lispund*, in order to indemnify the Factor of the great Expence and Trouble of collecting the loose Butter from different and distant Parts, and afterwards packing it up in Barrels for the Market. Some Allowance was likewise due to the Factor from this Consideration, that the loose Butter, paid in small Quantities, is generally of a worse Quality, and would fall off in the Weight when properly packed up in Barrels, and prepared for the Market. An Evidence of what is here said remains to this Day. For, that notwithstanding the Defender's Estate in *Orkney* has been of later Years better understood than in former Times, he still allows his Factors to account for the loose Butter at the rate of eight *Lispunds* to the Barrel, though, upon Trial, it appears that the Barrel really contains no more than six and an half *Lispunds*, or thereby.

This shews how precarious and uncertain the Rule is which the Pursuers would resort to for ascertaining the Weights, by comparing the Barrel with the *Lispund*. As the Conversion of the *Lispund* into the Barrel depended merely upon the various and fluctuating Agreements between the Factors and Collectors of the Rents of *Orkney* and their Constituents.

2do, The Pursuers whole Calculation in this Matter, which is in-

instituted upon this Supposition, That the Barrel now does, and always did contain 180 *lib.* Weight. But that this is a false Assertion is proved by the Depositions of *Harrie Nisbet*, *Thomas Linay*, and *John Riddoch*, that the Barrel does now contain 200 *lib.* Weight, which is a ninth Part more than what the Pursuers give out. therefore the Barrel has always been the same, and yielded 200 *lib.* Weight, all the Calculations and Reasoning raised by the Pursuers, upon the Supposition of its containing only 180 *lib.* must fall to the Ground.

p. 254.
p. 256.
p. 190.

3tio, No satisfactory Evidence can arise, that the Barrel ever contained 15 *Lispunds*, from the Accounts of the Thirds of Benefices or other Documents referred to by the Pursuers. For that altho' the Accounts referred to in the Years 1562, 1568, and 1569, seem to estimate or compute 15 *Lispunds* to the Barrel, yet at the same Period, viz. in the 1561 and 1568, it appears from the same Accounts and from the Reddendo of a Charter 1584, that sometimes seven and an half *Lispunds*, sometimes 12 *Lispunds* were computed to the Barrel. The particular Excerpts referred to by both Parties upon this Article are fully inserted in the prepared State, (43, 44, 45, 46.) which 'tis hoped will be looked into; where it will appear that from 1561 to the 1569, the Proportion of *Lispunds* to a Barrel differed extremely. Sometimes 7 *Lispunds* and an half, sometimes 12 *Lispunds*, sometimes 15 *Lispunds* were computed to a Barrel. In such Uncertainty and Variety, how is it possible to draw a determined Conclusion as to the Proportion between the *Lispund* and the Barrel. These Documents therefore can serve to no Purpose, but to prove what we have said, that there was no fixed Proportion between the *Lispund* and the Barrel, but that the Computation made depended entirely upon the Agreement between the Collectors and their Constituents. Sometimes more *Lispunds* being allowed to the Barrel, and sometimes fewer.

Gen. Register,
lib. 42. n. 4.

As to the Increase of the *Lispund*, alledged to have been made during the Time of Earl *Patrick* and succeeding Times, as the Proof of it depends entirely upon the whimsical Computation of *Lispunds* in a Barrel, which was merely arbitrary and variable it seems unnecessary to take any farther notice of it.

The Pursuers endeavour to support their Assertions, that a Barrel anciently contained 15 *Lispunds*, by Sir *John Skene's* Authority, in his Treatise *de verb. sig. voce SERPLATH*, and by a Manuscript said to be Lord *Haddington's*.

To

To shew how little these Authorities are to be relied upon, Sir John Skene's Words shall be set down, whence it will appear that he knew nothing of the Matter, and has taken what he says at second-hand, without understanding what he wrote. His Words are,

“ The Malt, Meal, and Bear, are delivered in Orkney by Weight, in
 “ this Manner: *Imprimis*, 24 Marks make ane Setteen; item, six Set-
 “ teens makes ane Meil; item, 24 Meils makes ane Last; item, of
 “ Meil and Malt called *Coist*, ane Last makes ane Scottish Chalder;
 “ item, ane Last and an half of Bear contains 36 Meils; 36 Meils
 “ makes ane Chalder. Item, the Butter is delivered in Barrels,
 “ where the Quantity is great, but where the Quantity is small, it is
 “ delivered in Marks and Lispunds, that is to say, 24 Marks makes
 “ ane Setteen, as said is, and six Setteens makes ane Lispund; ane
 “ Stane and two Pounds Scottish makes an Lispund. Item 15 Lis-
 “ punds makes an Barrel, &c.

From this it appears, that Skene held the Mark as the lowest Weight in Orkney, but does not give its Contents. He is right enough in his Description of the Weights for Grain, but he blunders strangely in the Weights of Butter. He says, 24 Marks make ane Setteen, and 6 Setteens, 1 Lispund: This would make the Lispund contain no less than 72 *libs.* even if the Mark was to be computed at eight Ounces. Then he says, that a Stone and two Pounds Scottish makes a Lispund, which is absolutely inconsistent with what he said immediately before. Then he says, fifteen Lispunds make a Barrel, which is what the Pursuers would lay hold of, as serving their Purpose; but it is plain no Reliance can be had upon an Account so confused, inconsistent, and contradictory. At the same time, if any Faith could be given to Skene, he, in the most positive Manner, overturns the whole Foundation of the Pursuers Argument, which is raised upon this, that the Barrel consisted always of 180 *lib.* and no more; whereas Skene makes at least 18 *lib. Scots*, in the Lispund, and 15 Lispunds in the Barrel, which brings out 270 *lib.* to the Barrel, in place of 180. If the Pursuers will rest upon this Proof, it establishes one Thing, which is very possible, that the Barrel was anciently much larger than it is now, which will destroy the whole of their Reasoning.

As for the Manuscript they mention, it contradicts Skene in one material Article, as it makes a Barrel consist of 10 Lispunds only in Place of 15 Lispunds, according to Skene.

Is it possible that such lame, imperfect, and contradictory Citations from Authors, who had no Occasion to know the Subject, should have any Weight or Authority to overturn the established Weights of a Country, which have prevailed for time immemorial? These Inconsistencies and Contradictions can only be accounted for from this, that, in fact, there was no fixed and certain Relation betwixt the Barrel and the *Lispund*.

Again, if the Barrel had consisted of a certain Number of *Lispunds*, and if the *Lispund* had been increased betwixt the 1562 and the 1600, as the Pursuers pretend, it must follow, that the same Number of *Lispunds* would have filled more Barrels, by one Half, in the 1600, than they did in the 1562, and yet we find Evidence of the contrary. For, in 1562, we find by the Accounts of the Thirds of Benefices, that the Butter of the Bishoprick, mostly payable in *Lispunds*, must have been 103 Barrels, and, in the 1601, it extends scarcely to 103 Barrels: Whereas, according to the Pursuers Supposition, it must have filled 152 Barrels. This appears to be a Demonstration, that the *Lispund* had not been increased in that Period.

Thus far we have proceeded upon the Pursuers Supposition, that the Barrel has been immutable, and always continued the same, and have shown, that even in that View, no certain Conclusion can be formed, to ascertain the Weight of the *Lispund*. We must now beg leave to ask by what Authority or upon what Evidence the Pursuers pretend to establish this Immutability of the Barrel; for they have produced no original Standard, or authentick Document, fixing the Contents of the Barrel more than of the Weights. It will probably be said, that they have proved, by the Witnesses produced, that the Contents of the Barrel have been always the same, and made by the same Gauge. But this Evidence, with respect to the Barrel, is not near so compleat or satisfactory, as the Evidence brought by the Defender of the Immutability or Sameness of the Weights for near 200 Years by-past. The Contents of the Barrel are only proved by living Witnesses; whereas the Defender has proved the Identity of the Weights, not only within the Memory of Man, by living Witnesses; but much farther back, by a Variety of written Evidence, as is before mentioned.

Such being the Case, we desire to know, by what Authority, or for what Reason, the Barrel should be made the Standard, or the Trial of the Weights, rather than that the Weights should be made

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the Standard or Trial of the Barrel. If the one was to be tried by the other, the Identity of the Weights being better proved than that of the Barrel, the Weights ought rather to be made the Standard.

Let the Tables be turned, and the Case supposed, that the Defender had brought his Action to have it declared, that the Contents of the Barrel had been diminished, and that it ought to have been increased to its ancient Size. Every Argument now used by the Pursuers would have acted with equal Force in favour of the Defender. He has proved the Identity of the Weights for near 200 Years backward, both by Parole and written Evidence. These Weights he would insist to be the Standard of the Barrel, and he would make use of the Pursuers Proof to show that the Barrel had anciently contained 15 *Lispunds*, whereas it only now contains 6 and a half. He would have used the Pursuers favourite Authority, *Skene*, to show, that the Barrel formerly contained 270 *lib.* in place of 180. In short, all the Arguments urged by the Pursuers, to establish the Weights from the Barrel, would have answered fully as well to prove the Contents of the Barrel from the Weights. The true Case is, that neither of them are the Standard of the other. The Barrel must continue upon the present Footing; and so must the Weights continue to be what they presently are, and are proved to have been for Time past Memory.

The Pursuers did farther mention a Variety of Facts, relating to the Standards of the Weights and the weighing Instruments, whence they would infer a Proof of the Increase of the Weights, which may be summed up in the following Particulars. 1^{mo}, They alledge, that the *Bysmars* and *Pundars* are deceitful and fallacious Instruments, that they have been increased by the want of a legal Standard. 2^{do}, That there was an Assize *Steelyard*, or Iron Standard, in the Time of *William* Earl of *Morton*, in the Custody of *George Mowat*, the Assayer, by which all *Bysmars* and *Pundars* were appointed to be made and adjusted; and that he had also the Custody of an Assize Weight of Brass, of 16 *lib.* Weight, the same with the Centric *Lispund* used at that time, whereby the greater and lesser Weights were governed: But that, in the Year 1664, the said Earl, with Concourse of his Depute, and five more of his Party, issued an Order to the Custodier thereof, whereupon the Standard or Assize Weight was delivered up to his Baillie, and, in place thereof, a great Brass or Copper Weight of 28 *lib.* was brought from the South; and,

and, in default of the Assize Weight, certain Bones, Stones, and other Trumpery, were assumed, which have no Mark or Device impressed on them, and do not agree with themselves, nor correspond to one another; by which mock Standards the Country has been imposed upon, and the Weights greatly increased. And that, even of late, in the Time of *James Earl of Morton*, these Bones and Stones, obtruded as Standards, have been falsified and changed by the Assayer, and Lead run into the Bones, in order to make them heavier.

For Proof of these alledged Facts, the Pursuers refer to the Acts and Proceedings of the Commissioners of Excise in *Orkney*, from the Year 1660 to the 1674, to an Act of the Steward-principal and Justiciar of *Orkney*, anno 1675, and to the Minutes and Proceedings of their own Meeting in the Year 1743, where, amongst other Things, they "Found the *Bysmars* and *Pundars* fallacious, by "an undue Increase for many Years past."

To all which, it is answered, that the Defender is not answerable, either for the Weights or weighing Instruments; that neither he, nor any of his Predecessors, were the Makers, Contrivers or Custodiers of them; that the abstract Question betwixt the Parties being, whether or not the Weights are increased above what they ought to be; if there is no Proof brought of an Increase, it is immaterial, in the present Case, what the Standards are by which these Weights and Instruments are regulated and governed, when no Augmentation has been made appear by the Use of these Standards. And the Defender conceives that the Pursuers have not hitherto, by all or any of the Documents, they have so laboriously searched for and recovered, been able to instruct any Increase of their Weights. And their own Verdict or Judgment given in that Matter, in their own Favours, in the Year 1743, will not surely be admitted as true, because they have so asserted, without better Evidence than they have yet brought.

That, from all the Country-acts extant, that have been produced in this Process, it appears, that the Weights and weighing Instruments have been the peculiar Charge, and under the immediate Direction of the Steward-depute, Commissioners of Supply and Justices of the Peace of the County, for the time, with the Magistrates of *Kirkwall*, who, as it was their Duty and Interest, appear, by those Acts, to have taken particular Care to prevent any Innovation, Augmentation or Diminution of the Weights, and Falsification

cation in the weighing Instruments, by imposing Penalties on the Transgressors, and prescribing such Directions and Rules for making and adjusting the Instruments, and the Preservation of the Standard Weights, as were most proper and conducive for guarding against any falsifying of the one, or Corruption in the other. And, as it is not yet proved, that any such Thing has happened, so it is by no means credible, that, after so much Precaution, it is possible for the Pursuers to instruct, either that the Instruments have been any ways altered to the Prejudice of the Country, or the Weights augmented; for, as to what is pretended, of Lead being run into some of the Bones, it is founded upon Hearsay only, and merits no Regard.

As to the old Iron *Steelyard*, it is still extant, but it does not appear to have been ever used as a Rule or Standard, for making and adjusting *Pundars* and *Bysmars*, as pretended by the Pursuers, nor have they brought any Evidence of it, neither has it any Notches or Divisions marked thereupon, proper for a weighing Instrument. Thus far only the Defender is informed, concerning this Iron *Steelyard*, that the Stone, which presently gives the Setting of the *Bear-pundar*, when appended to the But-end of this Machine, brings the same to be horizontal, or *in equilibrio*; and that the Weight of this Stone is 20 *lib.* 8 Ounces.

And, with respect to the Brass Weight of 16 *lib.* and the other of 28 *lib.* Weight, the Defender knows nothing about either; nor is there any other Evidence or Authority condescended upon, for what the Pursuers have advanced, namely, that this 16 *lib.* Weight of Brass was the same with the Centrical *Lispund*, but their own Assertion only. If ever these two Weights, or either of them, have been made use of as Weights, or for regulating the Weights, it is plain they must have been soon laid aside, by the same Authority that introduced them into the Country, since it does not appear, that any Person, now in Life, that has been examined in this Cause, knows or remembers any thing about them.

All that appears, concerning these two Weights, is from the two Acts of the Commissioners of Supply and Justices of the Peace, one of them in *December* 1663, and the other in *November* 1664; and, when this last Act is looked into, it will from thence appear, with what Justice and Truth the Pursuers have alledged, " That *William* Earl of *Morton*, with Concourse of his Depute and five more
" of his Party, ordered the aforesaid Brass Weight of 16 *lib.* to be
" delivered

" delivered up to his Baillie, in order to substitute the greater
 " Weight of 28 *lib.* in place thereof: And that, in consequence
 " of said Order, the lesser Weight was delivered up." For, 1^{mo}, That
 Act, wherein only Mention is made of the 28 *lib.* Weight, is evi-
 dently an Act of the ordinary Commissioners of Supply and Stew-
 ard-depute, at making whereof *William Earl of Morton* is not said to
 be present, either by himself, or any for him. 2^{do}, It is no where
 said for what Purpose that Weight of 28 *lib.* was ordered to be
 brought from the South; far less can such an Absurdity be infer-
 red from it, that so great a Weight as 28 *lib.* was intended to come
 in place of a Weight of 16 *lib.* or that the 16 *lib.* Weight was de-
 livered up to that Earl's Baillie.

*Edmund, William
 Earl of Morton, &c.*

*T. a great weight of
 Brass on 100 year, contain-
 ing 28 *lib.* for the use of
 the use of the Country.
 See Brass Register,
 p. 61.*

But the Defender apprehends he has no Concern to vindicate ei-
 ther the Weights or Weighing-instruments, for the Reason already
 assigned; notwithstanding, at the same time, it appears to be ex-
 tremely probable, if not certain, that the Standards now objected
 to by the Pursuers as spurious, and, for their Rudeness, treated by
 them with the utmost Contempt, are the ancient and genuine Stan-
 dards of that Country, and that, by the several Acts of the Country,
 have been with the greatest Care and Anxiety, transmitted from one
 Assayer to another, upon Receipt always, for safe Preservation; at
 least the Pursuers, after all their most diligent Search and Scrutiny,
 have not been able to instruct any other Standard: For it is plain,
 from the two Acts above referred to, that the 16 *lib.* and 28 *lib.*
 Weights are but of a late Date, and had no Existence before the
 1663.

The Pursuers have likewise attempted to prove, that the Bones,
 Stones, &c. used for the Standard, never have been in use to be
 kept by the Magistrates of *Kirkwall* before the Year 1743. What
 the Pursuers intend by this, is with a View to prove, that the Stand-
 ards were always under the Direction and Charge of the Steward-de-
 pute, or some Person depending upon the Defender and his An-
 cestors, or others the Farmers and Chamberlains of the Country,
 whose Interest it was to have the Weights increased.

But, for the above Fact, the Pursuers have no more than a nega-
 tive Proof of three Witnesses, who depone to this Effect, That they
 never knew or saw those Standards, or any List or Catalogue of
 them, in the Possession of the Dean of Guild, or any other Magi-
 strate of *Kirkwall*, which cannot be regarded as any Proof, more
 especially, as the contrary is instructed by other two of the Pursuers

*Wit. 3d, 6th,
 and 40th.*

Wit. 41st.

own Witnesses: For *James Spence* depones, "That he has seen, as he thinks, an Order in the Records of the Town of *Kirkwall*, in *Provost Covingtree's* Time, for delivering up the above Stones, &c. to the late *Thomas Foubister*, who was Deacon of the Wrights of *Kirkwall*, or *Thomas Aitken* present Deacon, and Maker and Adjuster of the *Pundars* and *Bysmars*, but which of the two he does not remember."

Wit. 42.

And *Thomas Aitken* depones, "that when he was called upon to exhibit the Standards and Instruments, by which he has been in use to make and adjust *Pundars* and *Bysmars* for these many Years past, and ever since he was admitted into the Office of *Pundar* and *Bysmar*-maker, he had all these in his Custody in the same Manner he first received them from the then Town-clerk of *Kirkwall*, by Order of the then Magistrates and Council of the said Burgh, and gave his Receipt for them accordingly."

And this is further instructed and confirmed by two Extracts produced for the Defender, one of them bearing Date the 1st of *October* 1705, before the last Grant of this Estate to the Defender's Family, wherein it is recorded, that a Deputation, consisting of two Baillies, the Dean of Guild, and a Counsellor, is sent to receive from the Widow of a deceased Magistrate, the Town's Standard and Weights.

The other Extract, bearing Date the 10th *January* 1719, reciting, "that *Thomas Foubister*, Deacon of the Wrights, produced, in Council, a Stamp or Seal, marked G. R. for making and sealing the *Pundars* and *Bysmars* to be made and adjusted by him; and craved the Authority of the Magistrates and Council for using the same; and that none other might make, adjust or seal *Pundars* or *Bysmars*, but he and the subsequent Deacons, for the Time; the Council found the Desire reasonable, and appointed the same accordingly."

Wit. 1st, and
40th.

Numb. VI.

The Pursuers likewise pretend to prove the Disagreement of *Pundars* and *Bysmars*, and Loss of Proportion. This has indeed been proved by two of the Pursuers Witnesses. But all that can be inferred from this, amounts to no more than an Inaccuracy in the Maker and Adjuster of those Instruments, whereby it may happen, that one may give more, and another less than it ought; and the Divisions may not be so geometrically proportioned as to make the Fractions correspond exactly to the Integer. But it appears from the Defender's Proof, that these Inequalities may not always be owing

ing to the Instrument, but more frequently to different Hands weighing thereupon; and at no Rate can be justly insisted on as any Argument or Proof of the Increase of the Weights above the common Standard, no more than one Firlok or Peck, in this Part of the Country, being larger than another, which frequently happens almost in every Parish, could be admitted as a Proof of an universal Increase in the *Linlithgow* Boll.

The Pursuers complain of the Increase of the Weights. There are several Witnesses adduced by them on this Head. Some who depone as to particular Islands, others that it prevailed universally. But, in the 1st Place, it terminates only in a Rumour or Report of the Increase of the Weights; which is no Proof that there was any just Ground for such Complaint. 2^{do}, Some of the Witnesses depone only of hearing such a Complaint, but do not condescend on the Time when it began, others mention it in so vague a Way as about twenty or thirty Years ago. Only *George Traill* depones, Wit. 40th. "that since he was appointed Chamberlain (which was in the Year " 1712) he always heard an universal and yearly Complaint of the " continued Increase of *Pundars* and *Bysmars*." And *William Spence* Wit. 1st. depones, from the Year 1717 to the 1722, there was a yearly Outcry against the *Pundars*, in regard of the Increase; but, as above said, there is no Relevancy in this to prove, that there was a real Increase in the Weights, the same amounting only to a Hearsay Evidence, supported by no Proof of the Fact complained of.

The Pursuers farther attempt to prove the taking away of the old *Pundars*, and others heavier substituted in their Place. For instructing of this, they have adduced six Witnesses, three of whom, viz. Wit. 13th, 16th, 17th, 21st, 26th, and 32d. depone all of them upon one and the same *Pundar*, and the Import of their Depositions is to this Effect; that about thirty Years ago, when *George Traill* was Chamberlain, there was a *Pundar* kept in the House of *Holland*, that went under the Name of the *King's Pundar*, upon which the Superior-duty payable out of the Islands of *Westray* and *Papa* was yearly weighed; that this *Pundar* having got accidentally some wrong Cast, whereby the Stone, when put on the Cleek on the short Arm, did not bring the Instrument to an Equilibrium, *George Traill* the Chamberlain, in order to rectify the same, caused the Smith of the Island drive on an Iron-ring, and fix a Wedge in the long End of the *Pundar*; but by this Alteration the Weight was found to be too much augmented, so that the next Year, upon a Complaint thereof, this *Pundar* was laid aside,

aside, and never afterwards used: That *George Traill*, upon this, caused the *Pundar-maker* make a new *Pundar*, and brought it into the Island of *Westray*, for receiving the Superior-duty. And *Thomas Sinclair*, the Pursuers 13th Witness, depones, that that *Pundar*, and also another *Pundar* brought into the said Island, for the above Purpose, by *Hary Nisbet*, in the Year 1743, were both larger than that which had been kept in the House of *Holland*, the first about eighteen Marks on the *Malt-pundar*, and the other brought in by *Hary Nisbet* three Marks. And *George Rendal*, the 21st Witness, depones, that he heard the aforesaid new *Pundar*, which *George Traill* caused make, was complained of as too big, by the late *Pharay* and others. And *Thomas Smith*, the 16th Witness, depones, that the *Pundars* now used in receiving the Superior-duty of *Westray* and *Papa*, are larger, by half a *Setteen*, than that *Pundar* of *Holland's* above deponed on.

Now, when this first Instance of the Pursuers Condescendence on this Head, and Proof endeavoured to be brought thereof, is duly considered, it is evident that these Depositions prove nothing to the Pursuers Purpose. The old *Pundar*, kept at the House of *Holland*, was, by some Accident, become unserviceable, as being too light, therefore the *Pundars* that came afterwards to be brought into the Island to supply the Place thereof, behoved, no doubt, to be heavier, but still that is no Proof they were above the Standard.

The next Instance relates to the Tub-measure, which *John Rendal*, the 17th Witness, depones, as far back as he remembers, his Father used for measuring his Bear; and that the Full of this Cask, when *George Traill* was Chamberlain, weighed two *Meils* upon the *Bear-pundar*, and that last Year, and for some Years before, it weighed only eleven *Setteens*. And *David Rendal*, the 32d Witness, who had been Servant to the preceeding Witness, *John Rendal's* Father, depones as to the same Tub-measure, that the Full of this Cask, about thirty Years ago, weighed generally two *Meils* of Bear on the *Bear-pundar*, and that it weighs commonly eleven *Setteens*, and but seldom eleven *Setteens* and a half.

This is as little to the Purpose as the other. Because, 1mo, There is no Certainty but that this Tub might have suffered some Alteration in such a Course of Years, whereby the Measure thereof might vary. But, 2do, Supposing no such Thing had happened, the Weight of Grain depends on the Quality and Dressing, so that the Measure can be no Rule for ascertaining and fixing the Weight.

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The last Instance is with respect to two *Bysmars*, concerning which *George Paterson*, the Pursuers 31st Witness, depones, That his Master, *Traill* of *Tirlot*, has one of them at *Towquoy*, and the other at *Tirlot*; that the one is eleven Years old, and the other twenty, as he is informed, and that the new *Bysmar* is three *Marks* heavier than the old one. This is no more to the Purpose than any of the former; for the odds in the *Bysmars* may be owing, either to the old *Bysmar*'s failing, and becoming too light, or to some Mistake in the *Pundar-maker* in making the new one, and not to any Increase of the Standard-weights.

It was also pretended to be proved, that *Pundars* and *Bysmars* were heavier after they were returned from being adjusted than before; and many Witnesses are adduced by the Pursuers on this Head, who concur in the Fact, as well as in the Cause thereof, namely, that they are never sent to be adjusted, but when found not to agree with the other *Pundars* and *Bysmars* used in the Country, by being either too light or too heavy; and therefore, when too light, must of course be heavier after they are brought to the ordinary Standard; as on the other hand, they must be lighter after Adjustment, if too heavy before; which last appears, from the Deposition of *James Wit. 7th. Smith*, to have been the Case of an old *Bysmar* that belonged to his Grandfather, which was lighter after Adjustment than before.

It was farther attempted to be proved by the Pursuers, that there were Lands in *Orkney* given up to the Defender and his Predecessors, as not being now capable of paying the Superior-duty, although better laboured than formerly, and now set below the Feu-duty.

From this, the Pursuers would obviously infer an Increase of the Weights; but it appears, from the Deposition of *George Traill*, the Pursuers 40th Witness, that it is only some small Feus set by *Douglas* of *Spynie*, that have reverted to the Superior, in Default of Payment of the Feu-duty. And for this another Reason occurs, than that to which the Pursuers would have it ascribed, viz. It is known that all the Lands feued out by *Spynie*, were feued out at the full Rent, the Lands then paid, besides a small Augmentation of the Rental; that the Successors of some of the original Feuers being less industrious, and a great deal more expensive in their Manner of Living than their Predecessors, have, by this Means, and the Negligence and Remissness of the Chamberlain, for the time, come in a Course of Years to run so far in Arrear, that it was equal to the Value of the Property or Interest they had in the Feu, whereupon, to

avoid Distress, they have sometimes made a Surrender of the same to the Superior. This is plainly the Case of those Feus, that have returned to the Superior in that Country, as appears from the aforesaid Deposition of *George Traill*, and is otherways notour. And it is submitted, if this can, with any Shew of Reason, be pretended as any Argument or Proof of the Pursuers Plea. Is any thing more common in other Parts of *Scotland*, than for Tenants to run in Arrear to their Master, above the Value of their Stocking? But this was never imputed to the Increase of the Measures of the Country, but to other Causes; no more can it, with any Justice, be pretended in the present Case. And as these Lands were feued out at the full Rent, it is nothing new to see Lands fall of their Rent in *Orkney*, more than in other Parts of *Scotland*, where it daily happens, though there is no Alteration in the Boll.

The Pursuers would, in the *next Place*, attempt to prove the cramming or beating down the Butter in Half-barrels, since the Practice of weighing, in order to make them contain 100 *lib.* Weight.— They adduce two Witnesses on this, the first of them, *viz. William Spence*, depones, “ That upon this cramming and beating down the Butter, he has sometimes seen the Hoops fly off the Cask.” But this Practice is frequently necessary, not on account of any Difficulty of packing the 100 *lib.* Weight in the Half-barrel. For it appears by the Depositions of *George Traill* and *William Scart*, the Defender’s 4th and 43d Witnesses, that they sometimes contain more, and the Superplus returned to the Payer; but on account of the deceitful Methods practised by the Vassals and Tenants, in making up their Butter, and the Trash with which it is often mixed, in order to bring it to a solid Consistency in the Cask.

The Pursuers endeavour to prove the Increase of the *Lispund* since the 1721; at least, that there are fewer *Lispunds* contained in the Half-barrel, since that Period. For Proof of this, there is only one Witness, *William Spence*, who depones, “ That in the Years 1719, 1720, and 1721, he packed in each Half-barrel, three *Lispunds*, and fifteen or sixteen *Marks* of Butter; and that in the Years 1730 and 1731, he could only pack three *Lispunds* and five *Marks* in the Half-barrel; and during all these Years the Half-barrels were made by *Magnus Linay*, and appeared to him to be of the same Dimensions.”—But this is no Proof of the Increase of the *Lispund*; for besides that this Testimony is single, unsupported by any other Witness, several Reasons may be assigned, as the Cause

Cause of the above Variation of ten Marks in the Half-barrel: As, 1^{mo}. The different Quality of the Butter received, 2^{do}. The Quantities by which it was delivered, whether in whole *Lispunds* or Fractions of a *Lispund*, which, according to the Testimonies of all the Witnesses, makes a considerable Difference; and in particular by the above mentioned *George Traill's* Deposition; and as none of those Circumstances are noticed by Mr. *Spence*, the Evidence given by him on this Point, under these Uncertainties, with respect to the Quality of the Butter, and Circumstances of the Delivery, merits little regard, and does not amount to any Proof of the Increase of the *Lispund*.

The Pursuers have, in like Manner, attempted to bring Evidence of there being more Half-barrels filled now, with the loose Butter payable out of the Island of *Sanday*, than in former Times. For Proof of this they resort to the Depositions of *John Meal* and *George Traill*, who both depone upon the same Period; for *John Meal* de-^{Wit. 23d, and 45th.}pones, "He was concerned in packing the loose Butter since *George Traill* was Chamberlain, and that for several Years, when he was first concerned in packing the loose Butter in *Sanday*, it generally filled betwixt 13 and 16 and a Half Barrels, as the Butter was ill or well paid; and the two last Years it filled 17 and a Half and 18 Barrels. And *George Traill* depone, that most of the Years he was Chamberlain, he received yearly, in the Island of *Sanday*, 15 Barrels, or 15 and a Half Barrels of loose Butter; and that, for these five or six Years past, he has heard there was 18 and a Half, or 19 Barrels of loose Butter packed in the said Island." So that, altho' both Witnesses depone upon the same Time, they differ widely on the Fact; and these Depositions serve only to demonstrate how irrational it would be to suppose, that either an Increase or a Decrease of the Butter delivered, could be proven from the Number of Barrels it takes to contain the same; such an Uncertainty arising from the Quality of the Butter delivered, which the Witness *John Meal* expresses, by the Butter being ill or well paid; as that what in one Year is contained in 13 Barrels, cannot the next Year be contained in less than 16 Barrels and a Half. And yet it is upon this, and such like fallacious Reasoning, that the whole of the Pursuers Plea is founded.

Thus the Defender has endeavoured, he hopes with Success, to take off the Force not only of the most plausible Arguments urged in Support of the Pursuers Libel, but has even descended to take
more

more Notice of the less considerable ones, than they seem to deserve. If the Pursuers shall, from their Love of Confusion and Perplexity, which indeed is the main Strength of their Cause, throw out any new Arguments which have not been foreseen, the Defender is in no Fear of them, being confident, that, upon the solid Foundation of immemorial Custom and Usage, upon which his Defence rests, he will be easily able to obviate any thing of that Kind at the Bar.

We must now take the Liberty to ask the Pursuers, upon what Grounds they can form the smallest Expectation of your Lordships decerning, in Terms of the Conclusions of their Libel, that the Weights, which are used at present, and have been used for time past Memory, in *Orkney*, should be diminished, and that the *Mark* Weight should be reduced to 8 Ounces; the *Lispund* to 12 *lib.* Weight; and the rest of the Weights in Proportion; seeing there is no publick Act or Ordinance, fixing a Standard of Weight in this Country. Is it by the present Weights of *Norway* that the Weights in *Orkney* are to be regulated, because *Orkney* was, 300 Years ago, a Province of *Denmark*? This is evidently too absurd to be listened to. Is it by any ancient Standard-weight in *Orkney*, preserved and handed down by Tradition to this Day? Neither can this be pretended. For the Instruments and Weights, which have always been held to be the Standard, and have, as such, been kept by publick Officers, are the very Weights which the Defender now uses, and which have been immemorially held as the Rule over the Country. — Is it because a Barrel of Butter, which is said to have contained of old 15 *Lispunds* now contains only 6 and a half, that they would infer the *Lispund* had been augmented in that Proportion? But this conjectural Evidence is proved to be, in every respect, altogether undecisive. There never was a fixed Proportion betwixt the Barrel and the *Lispund*. The Conversion of the one into the other was accidental and variable, and, in the same Period, inconsistent and contradictory. Besides, if it had been proved, that the Barrel once contained 15 *Lispunds*, how can it be from thence determined, whether the *Lispund* has increased, or the Barrel has decreased? The Arguments upon the one Side are fully as strong as those on the other. The Identity of the Weights, in all time within Proof, is most firmly ascertained in the Identity of the Barrel. And the Absurdity of the Pursuers Conjectures, and the Identity of the Weights, is plainly confirmed by the equal Pace which the Prices

Prices of the same Denominations of Butter and the same Denomination of Grain have all along kept, both weighed by the same Weights and upon the same Instruments. Or is it from the Rudeness of the weighing Instruments and the Standard-weights that the Pursuers would conclude an Increase of the Weights? Or from the trifling Discrepancies that occur in the different Instruments and Weights used over the Country? Or the other slighter Circumstances mentioned by the Pursuers? Neither can these be of any Effect. The Rudeness of the Instruments and Weights, however it may display the Ignorance of our Forefathers, will carry no Evidence, that the Weights have been raised. That the Instruments are fallacious is not disputed; but these being in the Hands and Custody of the Country, the Fallacy of them must have been much more dangerous to the Superiors; absent, and ignorant of these Matters, than they could be to the People, who constantly used them. The small Difference in the several Weights, used in the Country, from one another, is no more than what happens in every other Part of the World, and must happen, from the Inaccuracy of the Makers and Adjusters of these Instruments. Were the Weights and Measures, now used over *Scotland*, to be called in and examined, one would be surpris'd to see what Discrepancy would be amongst them; not only amongst these of different Counties, but even these of the same Town and the same County. In such a Case then what can be resorted to to fix and establish the Weights and Measures of a Country, which has no Standard to apply to, but the Weights and Measures, which have been constantly used by the People of the Country, not only for the Years of Prescription, but for time immemorial. Every other Method of ascertaining them must be precarious, delusive, and arbitrary. And it is upon that solid Foundation of Usage and Custom that the Defender bottoms his Defence.

The Defender cannot conclude without observing, that he has been forced into this Cause, and before this supreme Court, not only in Defence of the greatest Part of the Property of his Ancestors in these Islands, most unjustly attempted to be wrested from him, by this pretended Rectification of the Weights, but, in a Manner, as a Pannel, to answer to a Charge of the highest Nature, no less than an arbitrary and illegal Increase of the Weights of this Country, laid against his Predecessors and himself; for, though the Crime is not laid personally against him in direct Terms, the Facts

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charged amount to nothing less. Had they been guilty, either directly by themselves, or indirectly by the means of others under their Authority, of committing an Offence so gross, they would have well merited the Indignation of Judges and the Punishment of the Law. But, on the other hand, if no such Misdeeds are proved against them; if, on the contrary, there is clearly proved to have been no Increase of the Weights, since the Defender's Family had any Interest in *Orkney*, the Defender is confident that your Lordships Justice will not only dismiss this Action, as calumnious and vexatious, as it is in reality, but will likewise condemn the Pursuers in Damages and full Costs.

In respect whereof, &c.



AND. PRINGLE.